Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

CHRISTI ALFRED, individually,
Petitioner,

v.

CATERPILLAR, INC., a/k/a and/or d/b/a CAT,
a/k/a and/or d/b/a CAT, a foreign corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Introductory Statement:

Mid-trial, after presentation to the jury, and better than three (3) months after deposing Petitioner's expert witness, Mr. William P. Munsell, Respondent made a surprise *Daubert/Kumho* motion to disqualify Munsell as an expert, moved to strike his testimony, and for Judgment as a Matter of Law. Respondent made its *Daubert/Kumho* objection, *sans notice*, contrary to the specific language of the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and this Court's holdings in both *Daubert* and *Kumho*. Citing F.R.E. 702, the United States District Court for the Western District of Oklahoma erroneously determined that Petitioner's expert witness was not qualified to testify as an expert regarding whether Respondent's product was defective and unreasonably dangerous when designed, manufactured and introduced into the stream of commerce and granted Respondent's Rule 50 motion. The Court of Appeals for the Tenth Circuit reversed the District Court, correctly determining that Munsell was a qualified mechanical engineering expert under F.R.E. 702. Notwithstanding that it recognized Munsell as an expert, the Court of Appeals determined that Munsell's expert opinion and testimony in mechanical engineering, "standing alone" was insufficient to allow a reasonable jury to conclude, or infer, that Respondent's product was defective and unreasonably dangerous. The Court of Appeals thereafter sustained the District Court's decision to grant Respondent's Motion for Judgment as a Matter of Law under Fed. R. Civ. P. 50.

Whether the use of the word "preliminary" in F.R.E. 104, the use of the words "before trial" in Fed. R. Civ. P. 16, the use of the

word "notice" in Fed. R. Civ. P. 4 and 8, respectively, this Court's use of the words "at the outset" and "gatekeeping" in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993), and the words "precondition to admissibility" in *Kumho Tire Company v. Carmichael*, 526 U.S. 137, 149 (1999), mandate that any so-called *Daubert* objections be made in a timely manner, "at the outset," preliminar[il]y," "before trial," no later than pretrial, so as to allow due "notice" of the objection to the other party, and is the use of the above language within the referenced rules and precedent a command to protect and ensure compliance with the Fifth Amendment's Due Process Clause and the Seventh Amendment right to a jury trial?

Whether the Respondent's failure to make its *Daubert* objections in a timely manner pursuant to the authorities referenced in the first question, and the District Court's abdication of its "gatekeeping" duty, approved by the Court of Appeals, violated Petitioner's Fifth and Seventh Amendment rights?

Whether the District Court decisions in granting Respondent's Rule 50 motion, approved by the Court of Appeals, despite Respondent's knowledge of the basis for its motion for three (3) months prior to trial, and despite Respondent's failure to provide timely notice of the basis of its objection pursuant to the authorities referenced in the first question, deprived Petitioner of her Fifth and Seventh

Amendment rights?

Whether, the Court of Appeals decision sustaining the District Court's ruling granting Respondent's Rule 50 motion despite reversing that Court's holding that Munsell was not an expert, which readmitted his testimony to the record, restoring Petitioner's *prima facie* case so that when viewed *in toto,* not "standing alone," and in a light most favorable to Petitioner, violated Petitioner's Fifth and Seventh Amendment rights?

Whether Respondent's failure to make timely *Daubert* objections pursuant to the authorities referenced in the first question, so as to allow due "notice" of the objection to Petitioner, is permanently fatal and forever waives its *Daubert* objections, thus requiring that Petitioner's case be remanded for a new trial?

PARTIES TO THE PROCEEDING

PETITIONER

Petitioner Christi Alfred is an individual.

RESPONDENT

Caterpillar, Inc., is also known as or is doing business as CAT. Caterpillar, Inc., has no parent corporation. No publicly held company owns ten percent or more of its stock.

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I. There is a conflict in the Circuit Courts of Appeal on whether an untimely *Daubert* motion is waived or can be made late in litigation without having first made a pre-trial motion *in limine* or other concurrent objection and the question presented is important to

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Christi Alfred (Petitioner) respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The order of the Court of Appeals on the Petition for Rehearing is reproduced in App. A at 1a-2a. The order and opinion of the Court of Appeals on the merits is reported at 262 F.3d 1083 (10th Cir. 2001), and is reproduced in App. A at 3a-13a. The order of the United States District Court for the Western District of Oklahoma on the Motion to Reconsider is reproduced in App. C. at 14a-15a. The order of the District Court for the Western District of Oklahoma on the merits is unreported and is reproduced in App. D at 16a-17a. The transcript of the trial containing the opinion of the District Court for the Western District of Oklahoma on the merits is unreported and is reproduced in App E at 18a-20a.

JURISDICTION

The District Court for the Western District Court of Oklahoma exercised jurisdiction based on diversity and the amount in controversy, rendering a bench decision on August 14, 2000. The opinion of the Court of Appeals for the Tenth Circuit was issued August 21, 2001. Petitioner timely filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* which was denied on September 20, 2001. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, among other things, that "no person

shall...be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Seventh Amendment to the United States Constitution provides, among other things, that the "right of trial by jury shall be preserved...." U.S. Const. amend. VII.

STATEMENT OF THE CASE

This is a manufacturer's product liability case involving an asphalt paver, model AP-800B (paver). Caterpillar, Inc. (Respondent) designed, manufactured, marketed and sold the product via interstate commerce with a defective, unreasonably dangerous directional/speed *dial* control mechanism. The paver's unconventional directional/speed *dial* control mechanism caused the paver to pin Petitioner against a tree, injuring her severely and necessitating amputation of her leg below the knee.

In the District Court, the Petitioner presented expert testimony from William Paul Munsell (Munsell) who was examined and cross-examined *sans objection* from Respondent. Respondent fully deposed Munsell a full three (3) months prior to trial and *never* made a timely motion *in limine* or any other substantive, concurrent objection to Munsell's expert qualifications. Respondent moved for judgment pursuant to Fed. R. Civ. P. 50. after Petitioner's case was presented to the jury.

Respondent simultaneously moved to strike Munsell's testimony pursuant to *Daubert v. Merrell Dow*, 509 U.S. 579 (1993), and *Kumho Tire Company v. Carmichael*, 526 U.S. 137 (1999). Respondent challenged Munsell's qualifications beyond the August 1, 2000, deadline for filing motions *in limine* prescribed by the Court's Pretrial Order. The Court

sustained respondent's delayed *Daubert* objection contrary to *Macsenti v. Becker*, 237 F.3d 1223, 1231 (10th Cir. 2001), which provides that delayed Daubert motions are "forfeited." The District Court ruled that Munsell was not an expert per *Daubert* and *Kumho* and ordered his testimony stricken, (App. G at 48a) and granted Respondent's Fed. R. Civ. P. Rule 50 motion. *Id.* Petitioner's Motion to Reconsider Judgment with Combined Motion for New Trial was denied. App. C at 14a.

The Court of Appeals for the Tenth Circuit reversed the District Court's determination that Munsell was not an expert in mechanical engineering, sustaining the District Court's ruling that Munsell was not an expert in "human factors." App. B at 11a. Munsell's expertise in "human factors" became an issue at the close of petitioner's case when, *for the first time*, Respondent objected that Munsell was not qualified to opine that the paver's directional/speed *dial* control mechanism was "counter-intuitive." App. G at 39a-40a. Munsell based his opinion upon the industry standard promulgated by the Society of Automotive Engineers (S.A.E.) which had been admitted into evidence without objection and which called for the use of levers to control the forward/rearward motion of paving equipment. Respondent knew of the S.A.E. standards because its personnel had assisted in promulgating the S.A.E. standard. App. J at 106a-107a.

Munsell had knowledge and experience within human factors as an experienced, expert, mechanical engineer. Human factors is a sub-specialty of mechanical engineering. Relying upon his expertise and experience in mechanical engineering, Munsell stated his expert opinion, that the paver's directional/speed *dial* control mechanism was "counter-intuitive." App. H at 52a. Munsell's testimony that

the paver controls were "counter-intuitive" was derived from his experience as a human, mechanical engineer.

The Court of Appeals then sustained the District Court's determination that Munsell was not an expert in "human factors." The Court of Appeals determined that Munsell's testimony as an expert in mechanical engineering was insufficient, *standing alone*, to form the basis of a disputed material fact sufficient to withstand Respondent's Fed. R. Civ. P. 50 motion and sustained the District Court's decision to grant Respondent's motion and denied Petitioner's Petition for Rehearing. *The Court of Appeals reversed the District Court's determination that Munsell's testimony should have been excluded and yet sustained the District Court's ruling on Respondent's Rule 50 motion. That mixed decision alone calls for review.*

Respondent led Petitioner to believe that Munsell was an acceptable expert witness by never objecting or attempting to limit Munsell's testimony. Respondent even deposed Munsell as an expert three (3) months prior to trial and did not object to Munsell testifying to the jury. Petitioner had no notice whatsoever that Respondent deemed Munsell unqualified to be an expert. Respondent sandbagged Petitioner with a blatant ambush tactic, with the approval of both the District Court and the Court of Appeals, leaving Petitioner without a legal remedy, e.g., rehabilitating the witness and/or supplementing the evidence with additional expert testimony.

Respondent never requested a *Daubert* hearing to determine Munsell's qualifications, relevance and reliability. Respondent deliberately disrupted the orderly administration of justice to gain an evidentiary advantage in this litigation. This Court can take judicial notice that pretrial *Daubert*

hearings are extremely common in the federal courts and invaluable to the orderly administration of justice. Petitioner simply requests this Court determine whether *Daubert* hearings are to be conducted, if at all, in a timely manner before trial or are deemed forever waived.

Petitioner was deprived of due process when she was denied timely notice of Respondent's objection to Munsell's qualifications as an F.R.E. 702 expert. The gatekeeping requirement ensures the reliability and relevancy of expert testimony *before* it is introduced into evidence and it is incongruous for the Court to filter expert testimony after the jury sees and hears the testimony. Assuming no objection to the expert testimony is lodged prior to trial, or at least prior to presenting it to the jury, the lack of an objection constitiutes a tacit admission that the expert is qualified to testify under F.R.E. 702. Untimely *Daubert* motions constitute a waiver of the objection. *See Questar Pipeline Co. v Grynberg*, 201 F.3d 1277, 1289-90 (10th Cir. 2000), where the Court of Appeals held that "a party may waive the right to object to evidence on *Kumho/Daubert* grounds by failing to make its objection in a timely manner."

Petitioner was also denied a trial by jury on the merits of her claim because the Court of Appeals examined Munsell's testimony "standing alone" (App. B at 12a) without regard to the existence of disputed material facts and the favorable inferences reasonably made therefrom by a jury. Respondent's claim that its paver was manufactured as a state of the art piece of equipment *which complied with "accepted industry standards,"* (App.F, at 28a) was disputed by Munsell's opinion, "*standing alone.*" Additional questions existed regarding the weight and credibility of Munsell's testimony also existed. Accordingly, the Court of Appeals should have reversed the District Court's decision to grant

respondent's Rule 50 motion.

A. The Fifth Amendment to the United States Constitution provides, among other things, that "No Person shall...be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The increasingly common practice of making delayed *Daubert* objections violates both Fed. R. Civ. P. and the notice requirement of the Fifth Amendment's Due Process Clause. The Federal Rules of Civil Procedure have remedied many of the common law's harsh practices such as surprise or ambush tactics and using hidden or concealed evidence. Under the Fed. R. Civ. P., a judge may require litigants to notify each other of their witnesses, objections, anticipated testimony, etc. Fed. R. Civ. P. 16. Failure to cooperate in pretrial activities yields sanctions, including waiving the right to introduce evidence, make objections or assert defenses. *Id.* Petitioner and Respondent participated in a pretrial conference and submitted the required joint Final Pretrial Report. App. F at 20a-30a. The Court approved the parties' Final Pretrial Report on August 14, 2000. App. E, at 18a-19a.

This Court determined in *Goldberg v. Kelly*, 397 U.S. 254 (1970), that when federal law creates a right, any denial of that right without notice and a hearing violates due process. Referring to New York's plan to stop AFDC payments *sans notice*, this Court said that "such benefits are a matter of *statutory* entitlement for persons qualified to receive them." (Emphasis added). *Id.* at 262. This Court also said

> "'[t]he fundamental requisite of due process of law is the opportunity to be heard.' *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). The

hearing must be 'at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). 'In the present context these principles require...timely and adequate notice detailing reasons..., and an effective opportunity to defend by confronting any adverse witnesses and by presenting arguments and evidence... These rights are important in cases...challenged...as resting on incorrect or misleading factual premises ***or on misapplication of rules or policies*** to the facts of particular cases." (Emphasis added). *Id.* at 267-268.

This Court also said

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While it is important in the case of documentary evidence, it is more important where the evidence consists of testimony of individuals.... We have formalized these protections in the requirements of confrontation and cross-examination. This Court has been zealous to protect these rights from erosion. It has spoken out...in all types of cases where administrative...actions were under scrutiny," *citing* with approval *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959).

Id. at 270.

The Federal Rules of Civil Procedure are the law under which the District Courts administer justice in the same way administrative agencies administer services to the general public. In both situations, the law requires due process. Second only to administrative agencies, and much more than the executive and legislative branches, the judiciary is where the public interfaces with government regularly. If, as in *Goldberg*, an administrative agency fails to recognize rights conferred by federal law, due process is violated, the same must hold true when a court fails to recognize rights conferred by federal law, such as the right to timely notice of any action which infringes Fifth and Seventh Amendment rights.

The Federal Rules of Civil Procedure were promulgated by the federal judiciary pursuant to authority granted by the Rules Enabling Act, 28 U.S.C. § 2071-2077. Pursuant to that Act, the Supreme Court has prescribed that the Federal Rules of Civil Procedure be adhered to in all federal civil proceedings. 28 U.S.C. § 2072, 2075. Congress has allowed the rules to take effect *as a matter of law* pursuant to 28 U.S.C. § 2074. Accordingly, it is *a matter of federal law* that Petitioner has certain statutory, procedural rights created by the Fed. R. Civ. P. designed to secure justice consistent with the United States Constitution. The federal law creating the Federal Rules of Civil Procedure creates a right to receive timely notice of the procedures utilized in litigation and denial of that right violates due process.

The Federal Rules of Civil Procedure establish a system for judicially redressing injuries and Petitioner is entitled to a fair hearing consistent with due process under

those rules. The foundation of the Federal Rules of Civil Procedure is *notice* pleading. Fed. R. Civ. P. 4 and 8. Additionally, the United States District Court for the Western District of Oklahoma has adopted local rules to assist its administration of justice. The local rules were enacted May 1, 1998, with the most recent revisions effective on September 14, 2001. The local court rules, Rule 16.1, strengthen and reinforce the requirements of Fed. R. Civ. P. 16. Both the Fed. R. Civ. P. and the local court rules are designed to protect Petitioner's and Respondent's, rights.

Respondent acted in bad faith by *deliberately delaying its Daubert objection for three (3) months. Respondent's conduct was designed to sandbag Petitioner's claim and denied Petitioner her due process rights under the Fed. R. Civ. P., applicable local court rules, and this Court's precedent.* Respondent and the District Court disregarded Petitioner's statutory notice rights. *See Goldberg, supra.* The Federal Rules of Civil Procedure are to "be construed and administered to secure the just...determination of every action." Fed. R. Civ. P. 1. Failure to give timely notice of *Daubert* objections does not "secure the just...determination of every action." *Id.*

In the instant case, pursuant to the aforementioned District Court's local court rules, Rule 16.1(b)(1)(B), (App. I at 54a-55a), the Final Pretrial Report, as approved by the court, superceded all previous pleadings and constituted "an order of the Court as to all matters contained therein." *Id.* The Final Pretrial Report is *the* record of the parties' complaint, responses, affirmative defenses and associated objections. The Final Pretrial Report reflects that the Respondent failed to make an objection to Munsell's expert testimony under F.R.E. 702. The only pretrial objections made by Respondent to Munsell's expert testimony and

exhibits were under F.R.E. 401, 402, 403, 801 and 802. App. F, at 30a, 31a, 36a-37a. On the opening day of trial, Respondent did not further supplement in any way its pretrial objections to Munsell's expert testimony and qualifications, saving the *Daubert* objection until the close of Petitioner's case. The constitutional rights of the Petitioner were violated when the District Court granted Respondent's mid-litigation, stealthy, ambush-style, *Daubert* motion *sans* timely notice as required by the law governing civil procedure.

To constitute a valid Fifth Amendment due process concern, there must be government action abridging a constitutional right. See *Shelley v. Kramer*, 334 U.S. 1 (1948), wherein this Court determined that judicial enforcement of racially restrictive covenants as to property bought and sold between private, civil parties would constitute sufficient government action to violate extant civil rights laws and the Constitution, and therefore could not be allowed. Any judicial action which fails to protect, or assists in denying Petitioner's right to timely notice under the Fed. R. Civ. P., deprives Petitioner her right to due process and is more than sufficient to constitute government action.

Shelley addresses state judicial action under the Fourteenth Amendment, and the strength of the analogy to federal judicial action under the Fifth Amendment in the instant case is compelling. The judiciary's failure to enforce the law under the Federal Rules of Civil Procedure, a federal statute, cannot be allowed as it constitutes sufficient government action denying Petitioner's right to due process under the Fifth Amendment. Such action also denies Petitioner her right to redress her injuries before a jury of her peers under the Seventh Amendment. "In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed." *Railway*

Employees' Dept. v. Hanson, 351 U.S. 225, 232 (1956).

This Court's wisdom in *Shelley* was evident when it stated

> "'Thus, in Commonwealth of Virginia v. Rives, 1880, 100 U.S. 313, 318 , this Court stated: 'It is doubtless true that a [government] may act through different agencies,-either by its legislative, its executive, or its judicial authorities; and the prohibitions of the [Fifth] amendment extend to all action of the [government] denying [due process], whether it be action by one of these agencies or by another.' In Ex parte Commonwealth of Virginia, 1880, 100 U.S. 339, 347, the Court observed: 'A [government] acts by its legislative, its executive, or its judicial authorities. It can act in no other way.' *Id* at 14.

In *Shelley*, this Court also stated "[I]t has never been suggested that...court action is immunized from the operation of [the fifth amendment] simply because the act is that of the judicial branch of the...government." *Id.* at 18. This Court also cited *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680, 454 (1930) where "the Court, through Mr. Justice Brandeis, stated 'The federal guaranty of due process extends to [government] action through its judicial as well as through its legislative, executive, or administrative branch[es] of government.'" *Id.* at 15.

Finally, this Court stated in *Hurd v. Hodge*, 334 U.S. 24 (1948),

> "We are here concerned with action of federal courts of such a nature that if taken by the courts of a State would violate the prohibitory provisions of the [Fifth] Amendment. Shelley v. Kraemer, supra. It is not consistent with the public policy of the United States to permit federal courts...to exercise general [legal] powers to compel action denied the state courts where such state action has been held to be violative of the guaranty of [due process]. We cannot presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights [by] federal courts than against such action taken by the courts of the States." *Id.* at 35-36.

Respondent deposed Munsell fully on May 5, 2001, and sat on its objections more than three (3) months. Munsell's trial testimony was no different from that given in his deposition. Early notice of Respondent's objection would have put the Petitioner on *notice* that Munsell may be disqualified and would have afforded her the chance to rehabilitate her case using any number of remedies, including "lay[ing] a better foundation for the evidence." *Marbled Murrelet v. Babbit*, 83 F.3d 1060, 1067 (9th Cir. 1996). *Marbled Murrelet* also supports Petitioner's assertion that Respondent's delayed objections are waived.

B. The Seventh Amendment to the United States Constitution provides, among other things, that the "right of trial by jury shall be preserved...." U.S. Const. amend. VII.

It is established law that the Seventh Amendment grants the right to a civil jury trial in federal court. *See Curtis*

v. Loether, 415 U.S. 189, 195 (1974), where this Court said

> "[W]hen Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law."

With Munsell's expert testimony readmitted by the Court of Appeals, the summary dismissal of Petitioner's claim was inappropriate due to the existence of disputed material facts which could reasonably have resulted in a verdict for Petitioner. In the joint Final Pretrial Report, App. F. at 28a, Respondent asserted that its product was "appropriately designed in accordance with the state of the art and applicable industry standards." *Id.* Respondent's affirmative statement is disputed by Munsell's reliable and relevant expert testimony as an expert mechanical engineer that the paver *did not* comply with "applicable industry standards" (App. G at 41a-42a) and was more than sufficient to defeat Respondent's Rule 50(a) motion. The paver's compliance with applicable industry standards was disputed as was whether the Respondent "designed" the paver to comply with applicable industry standards.

It is settled law that Fed. R. Civ. P. 50a allows a court to remove a case away from a jury by entering judgment as a matter of law if there is insufficient evidence to raise a genuine factual controversy. *See Wimmer v. Suffolk County Police Dept.*, 176 F.3d 125, (2d Cir. 1999); *CVI/Beta Ventures, Inc. v. Tura LP*, 112 F.3d 1146, (Fed.Cir.1997), *cert. denied*, 522 U.S. 1109, 118 S.Ct. 1039, 140 L.Ed.2d 105 (1998). In the case at bar, once the Court of Appeals

determined that Munsell's testimony was relevant and reliable scientific evidence, his mechanical engineering expertise directly refuted Respondent's assertion that the paver was safe and complied with accepted industry standards.

The factfinder could reasonably conclude that Respondent's paver did not comply with accepted industry standards by reviewing Munsell's expert testimony and by examining the S.A.E. standards, which were admitted into evidence without objection. Munsell's opinions regarding the specialized field known as "human factors" were ancillary at best. Whether the paver's directional/speed *dial* control mechanism was "counter-intuitive" was not the main thrust of Munsell's testimony. A jury, could reasonably conclude by reviewing the S.A.E. standard in evidence as well as Munsell's testimony that the paver did not comply with that standard and in addition, was "counter-intuitive."

To the extent that Munsell's testimony regarding the counter-intuitive design of the directional/speed *dial* control mechanism was questionable because he lacks specific expertise in human factors, Respondent was free to point out same. In dealing with expert witness testimony, this Court in *Daubert v. Merrell Dow Pharmaceuticals*, Inc., 509 U.S. 579, 596 (1993), determined that "[v]igorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." The Respondent could have asked the jury to disagree with Munsell's opinion and find that pushing a lever forward to move forward and that pulling a lever backward to move backward is *not* intuitive. The Respondent had retained its own expert whose opinion differed from Munsell's. Indeed, the *mere existence* of Respondent's own expert, possessed of a different opinion than Petitioner's expert

establishes the existence of a disputed material fact.

Daubert provides that "[a] "reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community." *Daubert* at 594. *See also Kumho Tire Co. v. Carmichael*, 526 U.S 137, 156 (1999), where this Court stated that "no one denies that an expert might draw a conclusion from a set of observations based upon an extensive and specialized experience." Munsell merely testified that from a mechanical engineering perspective, Respondent's directional/speed *dial* control mechanism was counter-intuitive; that the human operator did not think about forward and reverse motions in the manner designed into the directional/speed *dial* control mechanism.

To the extent that Munsell's testimony delved into human factors, a sub-field of mechanical engineering, it was his opinion as an expert in the primary field of mechanical engineering, and one need not be an expert in human factors, and it is not a foreign concept to a jury, to state that pushing a lever forward to move forward and that pulling a lever backward to move backward is intuitive. Surely the law has not now reached the point where a party must endorse a separate identified expert in human factors to state an opinion that *pushing a lever forward to move forward and pulling a lever backward to move backward is intuitive nature in human beings*. *See Kumho v. Carmichael*, 526 U.S. 137, (1999), where this Court said "[a]nd whether the specific expert testimony focuses upon specialized observations, the specialized translation of those observations into theory, a specialized theory itself, or the application of such a theory in a particular case, the expert's testimony will rest "upon an experience confessedly foreign in kind to [the jury's] own."

Indeed, the Society of Automotive Engineers advocates the use of a lever control device on this type of equipment. Munsell's premise is empirically tested and incalculably repeated both consciously and unconsciously by experts and laypersons everyday. Arguably the court could have taken judicial notice of this fact rather than dismissing Munsell's opinion on human intuition as irrelevant and unreliable. In short, Munsell's opinion on what Respondent calls "human factors" was his, as well as any layperson's, empirical understanding of human interaction with mechanical devices. Clearly that opinion is grounded in Munsell's expertise and experience as a human, mechanical engineer.

C. The Proceedings Below

Respondent, a major manufacturer of heavy construction equipment, manufactured, designed and placed into commerce the subject paver, an AP-800B model. On March 6, 1997, the Petitioner was on active duty with the U.S. Navy at Rota, Spain. Petitioner was assigned to a construction battalion and while working as a groundsman on a parking lot project, was injured by Respondent's paver. Petitioner was directing the paver's operator and was ordered by her supervisor to stand between the paver and a tree to make sure the paver did not hit the tree. The paver operator utilized the control mechanism *as designed* and instead of reversing, the paver lunged forward. Petitioner was pinned against a tree and sustained serious injuries to her leg which was amputated below the knee. Petitioner alleged that the subject paver was defective and unreasonably dangerous with respect to its controls, i.e., that the controls were not in compliance with applicable industry standards in that they invited inadvertent inputs and results.

Respondent argued that the subject asphalt paver was neither defective nor unreasonably dangerous, that it was state of the art at the time of manufacture, and that it was manufactured in accordance with accepted industry standards. Respondent claims the sole cause of the Petitioner's injuries was operator negligence, negligence of the on-site supervisor, and Petitioner herself. Petitioner posits that the paver had a defectively designed, and unreasonably dangerous *dial* control mechanism as opposed to a safe lever control mechanism as approved and recommended by the Society of Automotive Engineers; standards which Respondent's own personnel helped draft and incorporate. In essence, it was Respondent's own standards upon which Petitioner's mechanical engineering expert relied to formulate his opinion.

The Petitioner's case was completed on the first and only day of trial, and was *admitted to the jury without objection* from Respondent. Munsell's testimony was similar in every respect to the testimony given during his May 5, 2000, deposition. Respondent did not object to Petitioner's expert or his opinion on the counter-intuitive design of the paver until *after* the close of Petitioner's case, a little *more than three (3) months after* first hearing Munsell's opinion in the deposition.

Interestingly and not coincidentally, just moments into Respondent's cross examination of Munsell, Respondent's counsel reinforced, if not proved, Munsell's opinion when he became confused while operating the dial mechanism on a full mock-up-clip of the subject paver's control panel. Munsell pointed out Respondent's counsel's confusion in front of both judge and jury. Munsell noticed that Respondent's counsel had "made the mistake that Mr. Worstell said [he made the day Petitioner was injured]." App. H. at 52a. *Mr. Worstell was the driver/operator of the paver the day Petitioner was*

injured. Both he and Respondent's counsel became confused by the inherent design flaw of the paver's direction/speed dial control mechanism. That in-court, real world display, in and of itself, reinforces Munsell's opinion that the paver's directional/speed *dial* control mechanism was "counter-intuitive."

Munsell is a mechanical engineering expert who opined that Respondent's paver's directional/speed *dial* control mechanism was "counter-intuitive," especially to laypersons. Respondent's counsel is a true layperson regarding heavy construction equipment and his confusion while operating the device is empirical evidence, presented to both the judge and jury, that Munsell's opinion that the paver's dial control is "counter-intuitive" is not unfounded, irrelevant, unreliable or unreasonable. Truly, a reasonable trier of fact could determine from these facts and conflicting evidence that the paver was "defective and unreasonably dangerous." App. G at 40a, 41a, 49a.

Despite significant foreknowledge of Munsell's testimony, at no time in the pretrial proceedings did the Respondent ever move *in limine* or otherwise indicate or preserve its objection to Munsell's testimony. The net effect of Respondent's delayed objection, *made after the testimony was admitted into evidence and viewed by the jury*, was that Petitioner was a victim of Respondent's deliberate "ambush trial tactics" (App. B at 8a) by a surprise *Daubert* motion contrary to Fed. R. Civ. P. 16, F.R.E. 104, and this Court's holdings in *Daubert* and *Kumho*. Despite the existence of disputed material facts on the record regarding whether Respondent's paver complied with industry standards, the District Court sustained Respondent's Rule 50 motion and the Court of Appeals affirmed after admitting Munsell's testimony as a mechanical engineer. That mixed decision

alone warrants review by this Court.

REASONS FOR GRANTING THE WRIT

I. There is a conflict in the Circuit Courts of Appeal on whether an untimely *Daubert* motion is waived or can be made late in litigation without having first made a pretrial motion *in limine* or other concurrent objection and the question presented is important to the orderly administration of justice nationwide to correct trial court behavior which is Contrary to Supreme Court Precedent in *Daubert* and *Kumho*, and is contrary to the Fed. R. Civ. P. and the F.R.E..

Some circuit courts allow *Daubert* motions late in litigation *sans* pretrial motions *in limine* or other concurrent objections while other circuits have rejected such motions as untimely ambush tactics designed to put opposing counsel and the court at a disadvantage. Such behavior is also contrary to this Court's precedent in *Daubert* and *Kumho*, and is as well contrary to the Fed. R. Civ. P. and the F.R.E.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993), this Court specifically wrote that when "[f]aced with a proffer of expert scientific testimony, then, *the trial judge must determine at the outset, pursuant to Rule 104(a),* whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact in issue." Emphasis added. The use of the phrase "*at the outset*" mandates that the time to address the reliability and relevance of an expert's testimony is *before it is admitted into evidence and presented to the jury at trial*. This Court's reference in *Daubert* to F.R.E 104(a) implicates that Rule's command that "preliminary questions such as the qualification

of a person to be a witness...or the admissibility of evidence..." be resolved "at the outset." *Daubert* at 592. Presumably, as with most *preliminary* litigation matters, the deliberate choice of words or phrasing of the various cases indicate that resolving questions regarding the admissibility of expert witness testimony under *Daubert*, F.R.E. 104(a) and F.R.E. 702 is to be done prior to the commencement of trial and outside the hearing of the jury.

F.R.E. 104's use of the word "preliminary" is consonant with *Daubert's* command that reliability and relevance determinations be made "at the outset." *Daubert* at 592. Additionally, that language underscores an intent to require the courts and the parties appearing before them to bring their challenges to expert testimony when they learn that expert testimony will be utilized. Such application of the *Daubert* rule fully comports with the "gatekeeping" requirement established in *Daubert* and reinforced in *Kumho*. Indeed, the use of the phrase "*at the outset*" and the direction that federal courts act as "gatekeepers" underscores an intention by this Court to require that expert testimony be challenged before the jury hears the testimony, not after. Despite this guidance, the circuits are split on how to address belated, untimely *Daubert* motions, and the orderly administration of fair, impartial and effective justice is impaired. The federal courts are in dire need of this Court's guidance to resolve the conflict.

The Court of Appeals addressed the issue of timely *Daubert* motions in *Mascenti v. Becker*, 237 F.3d 1223 (10th Cir. 2001). In that case, the Court of Appeals determined that the party opposing the expert testimony "forfeited the opportunity to subject the expert testimony" of the identified experts "to a *Daubert* challenge by failure to make a timely objection" *before* the "testimony was admitted." (Emphasis

added). *Id.* at 1231-1232. The court also noted that this Court stated

> "[a]fter rejecting the 'general acceptance' standard long applied from *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir.1923), *Daubert* concluded: 'To summarize: 'General acceptance' is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence--especially Rule 702--do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands. (citations omitted) Thus the trial judge is assigned the task of insuring that an expert's testimony rests on a reliable foundation and is relevant, but *Daubert does not mandate an inquiry questioning and challenging the scientific proffer absent a timely request by an objecting party*.' (Emphasis added). *Id.* at 1231-1232

The Court of Appeals also determined that the defendant's *Daubert* "motions were untimely" and that "[b]y waiting until after the close of all the evidence to raise the *Daubert* objection, *basic errors occurred*. The proponent of the evidence was deprived of the opportunity to offer supporting proof," emphasis added, i*d.* at 1234, to reinforce the qualifications of the expert and his testimony and adjust their case accordingly. Further, "the trial judge was disadvantaged" (*id.* at 1234) because they were "not alerted to the need of stating *Daubert* findings and analysis" as required. *Id.* at 1234.

However, contrary to the Court of Appeals for the Tenth Circuit, the Court of Appeals for the First Circuit held in *Hoult v. Hoult*, 57 F.3d 1, 4-5 (1st Cir. 1995), that

> "[w]e think *Daubert does instruct District Courts to conduct a preliminary assessment of the reliability of expert testimony, even in the absence of an objection*. We do not think, however, that District Courts are required, *sua sponte*, to make explicit on-the-record rulings regarding the admissibility of expert testimony." (Emphasis added).

Notwithstanding the disagreement between the Courts of Appeals for the Fifth and Tenth Circuits on whether *Daubert* mandates an examination of expert testimony *sans* an objection to the expert testimony, both Circuits seem to agree that evaluation of expert testimony is to be done in a "timely" (*Macsenti* at 1234), "preliminary" (*Hoult* at 4-5), manner. In other words it is to be done "*at the outset*" (*Daubert* at 592), of litigation, before trial.

In *Christopher v. Cutter Laboratories*, 53 F.3d 1184, 1192 (11th Cir. 1995), the Court of Appeals for the Eleventh Circuit noted that the defendant therein "filed no motion in limine challenging [the expert's] proposed testimony, nor did it raise any contemporaneous objections." The court concluded that "[i]n order to preserve this issue on appeal, [the defendant] must have objected to the challenged testimony." *Id.* Timely *Daubert* objections allows presentation of the best, fairest case, whether at the trial court or on appeal.

Despite *Daubert's* command to determine "at the outset" the reliability and relevance of expert testimony,

circuit courts are resorting to reviewing the record for plain error in cases where a party failed to timely raise a *Daubert* objection. Under extant law, reviewing a record for plain error is an inevitability when a *Daubert* determination is not done in a timely manner, i.e., "at the outset." *Mascenti v. Becker*, 237 F.3d 1223, 1231 (10th Cir. 2001), *citing Goebel v. Denver and Rio Grande Western R. Co.*, 215 F.3d 1083, 1088, n. 2 (10th Cir. 2000). This approach ignores the law of *Daubert* and inadequately patches a problem that would not exist but for the failure of federal courts to act as gatekeepers "at the outset" of litigation or when experts are identified, listed on pretrial orders and/or deposed, whichever is earlier. The problem also arises from the failure of attorneys to assert timely *Daubert* motions, file motions *in limine* or lodge other concurrent objections "at the outset," such as when experts are identified, listed on pretrial reports or orders and/or deposed, whichever is earlier.

Consider the following statement by the District Court in the instant case where the court stated it was

> "aware of no prohibition against moving to strike testimony rather than moving *in limine* ahead of trial. Often it is easier once the testimony has been given and more efficient rather than having a full-blown hearing where the witness testifies ahead of trial in order to establish the credentials of his opinion." App. G at 47a.

Petitioner respectfully submits that deposing Munsell *three-plus months ahead of time* gave Respondent the rule-mandated *notice* of Munsell's testimony. Said notice afforded Respondent the opportunity *and obligation* to object "at the outset," per *Daubert*, *Kumho*, Fed. R. Civ. P. 16, local court

Rule 16.1, and F.R.E. 104. However, Respondent utterly failed to give Petitioner notice to that it had *Daubert* objections to Munsell's expert qualifications. Gatekeeping "at the outset" avoids wasting judicial resources and guarantees that the parties' respective due process rights are honored, respected and preserved. Timely gatekeeping also avoids manifestly unjust gateslamming that may result, as in the instant case. This case is ripe for review.

II. Regarding The Rule 50 motion, The Decision of Both The District Court and The Court of Appeals is Erroneous.

In the instant case, at the close of Petitioner's case in chief, *without any notice whatsoever*, Respondent announced that it was moving for judgment as a matter of law pursuant to Federal Rules of Civil Procedure Rule 50. The Respondent moved

> "on the grounds and for the reason that the evidence, when taken in the light most favorable to the plaintiff, does not establish a prima facie basis for the elements of their cause of action. I would move simultaneously that the testimony of the expert, Mr. Munsell, be stricken under Daubert vs. Merrell Dow, 509 U.S. 579, and Kumho Tire Company vs. Carmichael, 119 South -- or 119 Supreme Court 1167." App. G at 39a.

The District Court granted Respondent's motion, striking Munsell's testimony and as well granted the Respondent's Rule 50 motion. Respondent cited *Daubert vs. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), as justifying the exclusion of Munsell's testimony, calling it

"junk science." *Id.* Respondent sought to invoke the protections of *Daubert*, but failed to comply with *Daubert's* directive that "determin[ations be done] at the outset...whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Daubert* at 592. Respondent made the Rule 50 motion at the close of Petitioner's case, a full three-plus months after it took Munsell's deposition where it first heard his expert opinions and the foundations thereof.

Respondent's deliberate conduct hardly comports with the letter and spirit of *Daubert vs. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Kumho Tire Company v. Carmichael*, 526 U.S. 137 (1999), the Fed. R. Civ. P., local court rules and the F.R.E.. Respondent's ambush *Daubert* motion effectively deprived Petitioner of her Constitutional rights under the Fifth and Seventh Amendments and was completely devoid of even an iota of good faith. And the Court of Appeals, in failing to fully reverse the District Court, has tacitly approved Respondent's *Daubert* ambush and allowed violation of Petitioner's constitutional rights.

The Respondent's tactics and the Court of Appeals review were not in consonance with precedent, particularly, *Wimmer v. Suffolk County Police Dept.* 176 F.3d 125, 136 (2d Cir. 1999), where the Court, *citing Galdieri-Ambrosini v. National Realty & Dev. Corp.*, 136 F.3d 276, (2d Cir. 1998), stated "the purpose of requiring the moving party to articulate the ground on which [judgment as a matter of law] is sought *'is to give the other party an opportunity to cure the defects in proof that might otherwise preclude him from taking the case to the jury.*" *Id.* at 286. (Emphasis added). The Court in *Wimmer* also stated that "[a]t a minimum, the judgment as a matter of law motion must 'identify the specific element that

the defendant contends is insufficiently supported." *Id.* Petitioner had neither notice nor time to respond accordingly to the Respondent's belated objection to Munsell's qualifications as an expert.

Petitioner contends that failure to give timely notice of the Respondent's *Daubert* objection waived the objection and prevented her from "identify[ing and correcting] the specific element that the defendant contends is insufficiently supported." *Id.* *See also Smith v. Northwest Financial Acceptance, Inc.*, 129 F.3d 1408, 1415 (10th Cir. 1997), where the Court said the "Federal Rules for Civil Procedure 50(a) requires that a motion for judgment as a matter of law state specific grounds upon which the moving party is entitled to judgment" and that "[t]his is to ensure that the motion is sufficiently precise to afford the opposing party and the judge the opportunity to properly respond." *Id.*

The Court of Appeals properly recognized Munsell's expertise in mechanical engineering and reversed the District Court. However, the Court of Appeals delineated a bright line between Munsell's expertise in mechanical engineering and his experience within the sub-field of mechanical engineering known as human factors. The Court of Appeals then sustained the District Court's determination that Munsell was unqualified in the field of human factors and opined that "standing alone, [it] was insufficient to allow a reasonable fact finder to conclude the paver was defective and unreasonably dangerous." App. B at 12a. Thereafter, the Court of Appeals sustained the District Court's decision to grant judgment as a matter of law. *Id.*

True it is that the standard of sufficiency of evidence justifying granting judgment as a matter of law under Fed. R. Civ. P. 50, requires more than "[A] scintilla or modicum of

conflicting evidence...." *Small Co. v. Lamborn & Co.*, 267 U.S. 248, 254 (1925). The evidence admitted by the Petitioner's, *without any objection*, when taken as a whole, and not just Munsell's testimony "standing alone," App. B at 12a, when viewed in a light most favorable to the Petitioner, successfully overcomes the threshold more-than-"a scintilla" (*Id.*) standard. The Petitioner's evidence *in toto* was more than sufficient to defeat Respondent's Rule 50 motion.

The Petitioner's evidence, *in toto,* consisted of Munsell's expert opinion as a mechanical engineer that the paver's directional/speed *dial* control mechanism did not comport with the S.A.E. standard; that *the* applicable industry standard was promulgated by some of Respondent's own personnel; and the real life in-court design-induced confusion suffered by Respondent's counsel when he became demonstratively confused by the paver's directional/speed *dial* control mechanism, as did the operator the day Petitioner was permanently injured. Add to that evidence the fact that Respondent possessed its own expert who was prepared to testify that the paver's directional/speed *dial* control mechanism was *not* defective and unreasonably dangerous, contrary to both Munsell's expert opinion and Respondent's counsel's aforementioned in-court, design-induced confusion.

Contrary to the standard applied by the Court Appeals which viewed Munsell's testimony "standing alone," when taken as a whole, the evidence that was admitted and presented to the jury, when viewed in a light most favorable to the plaintiff, militated strongly against granting a Rule 50 motion. There was not just a scintilla of evidence of disputed material facts, rather there was a significant volume of evidence of disputed facts. With the exception of Respondent's own expert witness testimony, ***all of Petitioner's above mentioned evidence had already been***

admitted into evidence and had been seen and heard by the jury. Yet, despite the foregoing, the Court of Appeals determined that "Munsell's testimony...standing alone, was insufficient to allow a reasonable finder of fact to conclude [or infer that] the paver was defective and unreasonably dangerous." App. B at 12a. The Court of Appeals ignored the abundance of Petitioners evidence which militated in favor of denying Respondent's Rule 50 motion and examined Munsell's expert testimony "standing alone." *Id.*

The Court of Appeals erred in sustaining the District Court's ruling granting judgment as a matter of law for another reason. The Court stated that even a jury "*infer[ence]* that the product fails to comply with published engineering standards...[did not]...establish, *by itself*, that the product is defective." App. B at 13a. The Court erred by reviewing any jury inference "by itself" and limiting that inference to the paver's non-compliance with the S.A.E. standard. By doing so, the Court of Appeals failed to recognize or consider that the jury could reasonably infer from Munsell's testimony, when combined with the fact that Munsell's opinion was based solidly upon the S.A.E. industry standard, that the paver was defective. Indeed, both Munsell's testimony and the S.A.E. standard in evidence were visibly and effectively reinforced *to the jury* when Respondent's counsel became confused while demonstrating the paver's controls in front of the jury. App. H at 52a.

Further, the applicable S.A.E. standard is not a human factors treatise but a general engineering treatise commonly accessed and relied upon by mechanical engineers and design manufacturers across the country. As stated above, the Court of Appeals failed to consider Respondent's counsel's in court display of design-induced confusion while operating the paver's directional/speed *dial* control. Petitioner alleged that

the confusion suffered by Respondent's counsel, and by the paver operator in Spain, would not have occurred had the paver complied with the applicable S.A.E. industry standard. Indeed, it appears that both the District Court and the Court of Appeals weighed the witnesses credibility and the evidence, which is a task reserved exclusively to the jury. *See Roth v. Swanson*, 145 F.2d 262, 265 (8th Cir. 1944), where the court stated "th[e] court cannot concern itself with the credibility of the witnesses or the weight of the evidence," *citing Elzig v. Gudwangen*, 91 F.2d 434, 439, 444 (8th Cir. 1937).

From the foregoing evidence and events, the jury could easily have inferred that the same design-inspired confusion which struck Respondent's counsel in court and in plain view of both judge and jury, also struck the paver operator that fateful day in Spain, severely mutilating Petitioner's leg. *See Texas Co. v. Savoie*, 240, F.2d 674, 675 (1957), wherein the Court stated

> "[I]n a civil action at law, the judge may direct a verdict if there is no issue of fact to be submitted to the jury on a decisive issue; provided of course, even where there is no conflict in the evidence, *if reasonable minds may fairly draw conflicting inferences from the same evidence, requiring different verdicts, the issue is for the jury to determine the correct inference.*" (Emphasis added). *Id.* at 675.

Unlike the facts in *Texas Co.*, there are disputed questions of fact in the Petitioner's evidence, and from which reasonable minds could draw conflicting inferences. Those conflicting inferences could result in a different verdict than that determined by the District Court or the Court of Appeals

when they granted and sustained, respectively, Respondent's Rule 50 motion.

Finally, also supporting petitioner's claim that she was denied notice, even the Federal Rules of Civil Procedure, Rule 16(c) recognizes that Rule 50 needs to be considered as early as possible and outside the presence of the jury.

> "[a]t [the pretrial] conference under this rule consideration may be given, and the court may take appropriate action, with respect to...(14) an order directing a party or parties to present evidence *early* in the trial with respect to a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a)..."

At the pretrial conference, which is memorialized in the District Court's Pretrial Order, App.F at 20a, *Respondent failed to advise either the court or Petitioner that it could move or intended to move for a Rule 50(a) determination based solely upon evidence Respondent learned of nearly three (3) months earlier. The Respondent and both the District Court and the Circuit Court have acted without considering the constitutional implications of denying Petitioner due process and her day in court.*

CONCLUSION

Upon reviewing the foregoing and the record evidence, it is clear that Petitioner was denied both her Fifth and Seventh Amendment rights. Review by this Court is warranted and the petition for writ of certiorari should be granted, the Court of Appeals should be reversed and Petitioner granted a new trial.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 00-6317

[September 20, 2001, Filed]

CHRISTI ALFRED,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
CATERPILLAR, INC., a foreign corporation, d/b/a CAT, a/k/a, CAT,	)
Defendant-Appellee.	)

Before Briscoe, Baldock and Lucero, Circuit Judges

ORDER

Appellant's petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. No member of the panel and no judge in regular active service on the court

requested that the court be polled on rehearing en banc so the suggestion for rehearing en banc is also denied.

Entered for the Court
Patrick Fisher, Clerk of Court

by: /s/
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 00-6317

[August 21, 2001, Filed]

CHRISTI ALFRED, *Plaintiff-Appellant*,	)
v.	)
CATERPILLAR, INC., a foreign corporation, doing business as CAT, also known as CAT, *Defendant-Appellee*.	)

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. CV-99-14-C)
D.C. Judge Robin J. Cauthron

JUDGES:
Before BRISCOE, BALDOCK, and LUCERO, Circuit Judges.

OPINION

LUCERO, Circuit Judge.

Plaintiff Christi Alfred was on active duty with the United States Navy when she was severely injured by a paver manufactured by defendant Caterpillar. In this product liability suit, she alleges the paver's design was defective and that the defect caused her injury. At the close of her case, the district court struck the testimony of plaintiff's expert witness and granted defendant's motion for judgment as a matter of law under Fed. R. Civ. P. 50(a). Plaintiff challenges both rulings. We again address the issue of timing of Daubert motions, and exercising jurisdiction pursuant to 28 U.S.C. §1291, we reverse in part and affirm in part the district court's decision to strike plaintiff's expert testimony on the merits and affirm the trial court's grant of judgment as a matter of law in defendant's favor.

I

Alfred was assigned to a construction battalion at the United States Naval Base in Rota, Spain. While giving hand signals to the operator of an asphalt paver, Alfred was ordered to stand between the paver and a tree. Nearing the tree, the operator stopped the paver on plaintiff's signal, but upon her subsequent order to reverse direction the operator mistakenly moved the paver forward, pinning her against the tree. His mistake appears to have consisted of failing to place the direction toggle switch into reverse mode before turning the rotary dial that controls the vehicle's speed. As a result of the accident, plaintiff's right leg was injured and later amputated below the knee.

Plaintiff alleges the paver's control mechanism is defective because it is counterintuitive; defendant responds that the accident was caused by human error and that the mechanism is not defective or unreasonably dangerous. At trial, plaintiff admitted that the operator made a mistake with the controls and that she should not have been standing between the paver and the tree.

To prove her case plaintiff relied on the testimony of her liability expert, William P. Munsell, that the paver contained a defect that made it unreasonably dangerous and caused plaintiff's injury--two of the elements of a manufacturer's product liability cause of action in Oklahoma. *See Alexander v. Smith & Nephew, P.L.C.*, 98 F. Supp. 2d 1310, 1318 (N.D. Okla. 2000) (citing *Kirkland v. Gen. Motors Corp.*, 521 P.2d 1353, 1363 (Okla. 1974)). Munsell, a mechanical engineer, testified that the use of a rotary variable speed control instead of a lever was "not intuitive" and was a direct cause of plaintiff's injury. (Appellee's App. at 40.) Plaintiff's only evidence regarding defendant's liability for product design was Munsell's testimony.

After plaintiff rested, defendant moved to strike Munsell's testimony on the ground that he was not qualified by knowledge, skill, training, or education to offer opinion testimony in the case and that he had done insufficient research to support his conclusion that the paver was defective in design. Defendant concurrently moved for judgment as a matter of law under Fed. R. Civ. P. 50(a). The court granted the motion to strike and, concluding that without Munsell's opinion plaintiff's case was not supported by the evidence, proceeded to grant judgment as a matter of law for defendant. The court made the following observations:

Mr. Munsell gave an opinion that was very limited and it was backed by very little work and very little expertise. I think Mr. Jennings has covered all that at the bench and it need not be repeated.

The only actual investigation that he did was to find a machine that had the lever rather than the dial in order to satisfy himself that it was possible, and to identify for the benefit of the jury the guidelines and standards on which he based his conclusion.

Aside from identifying those guidelines and standards, however, he has done no work that supports his conclusion that they are prohibited, that the design of this machine is defective, or that the guidelines and standard apply even to the mechanics of this machine.

. . . .

I find that his opinion is simply not competent under *Daubert* and other cases construing *Daubert*; that it is not supported by sufficient testing, experience, background, education, or thought to be relied upon by this jury. Without that opinion, I think it's quite clear that there is no evidence on which this case can go to the jury, and it is for those reasons and on that basis that I grant the defendant--first, the defendant's motion to strike the expert testimony and, secondly, its Rule 50 motion

for judgment as a matter of law.

(Appellant's App. at 8-9.)

II

Rule 702 of the Federal Rules of Evidence authorizes a "witness qualified as an expert by knowledge, skill, experience, training, or education" to give opinion testimony "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Consistent with the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, Rule 702 requires trial courts to act as gatekeepers, admitting only expert testimony that is both reliable and relevant. 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). "This gatekeeper function requires the judge to assess the reasoning and methodology underlying the expert's opinion, and determine whether it is scientifically valid and applicable to a particular set of facts." *Goebel v. Denver & Rio Grande W. R.R. Co.*, 215 F.3d 1083, 1087 (10th Cir. 2000) (citing *Daubert,* 509 U.S. at 592).

A

We turn briefly to the timeliness of defendant's motion to strike expert testimony after the close of plaintiff's case. In our recent decision of *Macsenti v. Becker*, 237 F.3d 1223, 1230-34 (10th Cir. 2001), this Court affirmed a district court's rejection of *Daubert* objections raised by a defendant at the close of all the evidence. In doing so, we concluded "that Defendant forfeited the opportunity to subject the expert testimony of [the] plaintiff's . . . experts to a *Daubert* challenge by failure to make a timely objection before that

testimony was admitted." *Id.* at 1231.

Recognizing that the law traditionally does not reward ambush trial tactics, in *Macsenti* this Court correctly criticized the practice of filing *Daubert* motions at a late stage in the adversarial process when there has been no motion in limine or concurrent objection to an expert's participation. Counsel should not "sandbag" *Daubert* concerns until the close of an opponent's case, thereby placing opposing counsel and the trial court at a severe disadvantage. *See Macsenti,* 237 F.3d at 1233-34. The truth-seeking function of litigation is best served by an orderly progression, and because *Daubert* generally contemplates a "gatekeeping" function, not a "gotcha" junction, *Macsenti* permits a district court to reject as untimely *Daubert* motions raised late in the trial process; only in rare circumstances will such tardy motions, albeit allowed under our decision in *Goebel*, be warranted. 215 F.3d at 1087 (indicating a district court can satisfy its *Daubert* gatekeeping role "when asked to rule on a motion in limine, on an objection during trial, or on a post-trial motion"). In this case, unlike in *Macsenti*, the district court chose to address the defendant's *Daubert* objections on the merits, rather than deeming them waived. Because of the split character of our disposition on the merits--affirming in part and reversing in part the decision to strike Munsell's testimony--we elect not to reach the issue of the motion's belated consideration, leaving for another day further development of *Macsenti's* timing jurisprudence.

B

Our review of a trial court's exercise of its *Daubert* gatekeeping function is for abuse of discretion. *Gen. Elec.*

Co. v. Joiner, 522 U.S. 136, 139, 139 L. Ed. 2d 508, 118 S. Ct. 512 (1997); *Goebel*, 215 F.3d at 1087; *Mitchell v. Gencorp, Inc.*, 165 F.3d 778, 780 (10th Cir. 1999). Under an abuse of discretion standard, a ruling will not be disturbed on appeal unless it is "arbitrary, capricious, whimsical or manifestly unreasonable" or when this Court is convinced that the trial court "has made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1163 (10th Cir. 2000) (citations omitted).

Plaintiff argues Munsell's testimony qualified as admissible expert testimony under the requirements of Rule 702 and *Daubert* and therefore was erroneously stricken. Munsell's testimony was based on engineering standards promulgated by the Society of Automotive Engineers ("SAE") as well as on his investigative work. Citing SAE Standard J297, entitled "Operator Controls on Industrial Equipment," he opined that the variable speed control on a paver should be in the form of a lever rather than a rotary dial. Because the paver involved in the litigation was equipped with a rotary dial instead of a lever, he concluded, its design was defective for failing to meet the SAE standard.

Munsell testified that he had nine years of experience in failure analysis and evaluation of industrial accidents, including investigation and analysis of various control mechanisms, and that he has routinely researched and applied engineering standards promulgated by various organizations, including the SAE. He testified further regarding his methodology in this case, which included researching engineering standards applicable to pavers, in particular those

governing speed control mechanisms, and applying those standards to knowledge gained during field research. Defendant did not dispute that the SAE standards upon which Munsell's opinion was based are well-accepted in the engineering community. Technical committees of the SAE draft and review engineering safety standards for mobility systems, including off-highway equipment. *See Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1316 (5th Cir. 1995). According to Munsell's testimony, several Caterpillar employees were members of committees responsible for promulgating the SAE standards.

Based on our review of the record, we are persuaded that Munsell's testimony that the speed control mechanism did not comply with SAE J297 was both reliable and relevant to the issue of defective design. *See Daubert,* 509 U.S. at 589. Munsell's testimony was reliable--meeting one of the *Daubert* criteria--because it was the result of his having researched and applied standards promulgated by an internationally recognized organization of engineers. The testimony was relevant--meeting the other--because although it is not dispositive and might be countered by conflicting testimony, it could allow the jury to infer Caterpillar's paver was defective for failing to meet industry design standards. Because that portion of his opinion qualified as admissible expert testimony under Rule 702 and *Daubert*, we hold that striking Munsell's testimony as to the paver's failure to comply with SAE J297 was an abuse of the trial court's discretion.

Munsell admitted that the factual issues at trial also concerned "a field of expertise known as human factors." (Appellee's App. at 51.) Not only did Munsell acknowledge

that there are specialists in human factors and that he is not one, but he also testified that his knowledge of that specialty was gained during a trip to the library the week prior to trial, after he had arrived at his opinion regarding the Caterpillar paver. Munsell conceded he had only looked at one paver during his preparation for the case, and that he had never seen a paver of the type involved in the accident or researched the control mechanisms of any types of pavers other than the one he saw. We found no indication in the record that Munsell had ever evaluated a paver prior to this litigation.

Those admissions demonstrate that Munsell's qualifications in the field of human factors were inadequate and that his field research and preparation for trial were cursory, undermining the reliability of his opinion that the Caterpillar paver's control mechanism is "not intuitive" to paver operators. (Appellee's App. at 40.) The only information Munsell was qualified to provide based on his experience and field research was that at least one manufacturer of pavers used levers instead of rotary dials for variable speed control. (See Appellee's App. at 48 ("I just know that levers are feasible.").) The trial court was well within its discretion in concluding, first, that the existence of one paver equipped with a lever instead of a rotary dial, standing alone, does not constitute relevant "specialized knowledge" that could help the jury to determine a fact in issue and, second, that Munsell was not "qualified as an expert" in the relevant field of human factors. Fed. R. Evid. 702. "The trial judge is granted great latitude in deciding which factors to use in evaluating the reliability of expert testimony . . . ." *United States v. Charley*, 189 F.3d 1251, 1266 (10th Cir. 1999). The trial judge's statement accompanying her ruling was sufficiently detailed to indicate

she had conducted an adequate *Daubert* analysis. *Cf. Goebel,* 215 F.3d at 1088 (holding a trial court's Daubert ruling inadequate where there was "not a single explicit statement on the record to indicate that the district court ever conducted any form of *Daubert* analysis whatsoever").

We reverse only the decision to strike that part of Munsell's testimony regarding compliance with SAE standards and affirm the balance of the *Daubert* ruling based on Munsell's lack of experience and training in human factors engineering, expressing no opinion on the merits of those aspects of the testimony. That, however, does not end the matter.

Questions remain whether the grant of judgment as a matter of law in defendant's favor would have been permissible had Munsell's testimony regarding Caterpillar's noncompliance with SAE standards remained a part of the evidence and been properly credited in the JMOL analysis.

III

We review *de novo* a grant of judgment as a matter of law. *Phillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 796 (10th Cir. 2001). Rule 50 "allows the trial court to remove cases or issues from the jury's consideration 'when the facts are sufficiently clear that the law requires a particular result.'" *Weisgram v. Marley Co.*, 528 U.S. 440, 448, 145 L. Ed. 2d 958, 120 S. Ct. 1011 (2000) (quoting 9A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure §2521, at 240 (2d ed. 1995)). Munsell's testimony regarding the failure of the speed control mechanism to comply with SAE J297, standing alone, was insufficient to allow a

reasonable finder of fact to conclude the paver was defective and unreasonably dangerous. Although the fact that a piece of equipment fails to comply with published engineering standards may allow a jury to infer that the product is defective, it does not establish, by itself, that the defect made the product unreasonably dangerous to an extent beyond that which would be contemplated by the ordinary consumer. *See Bohnstedt v. Robscon Leasing L.L.C.*, 1999 OK CIV APP 115, 993 P.2d 135, 136 (Okla. Civ. App. 1999) (setting forth the essential elements of a products liability action under Oklahoma law). Aside from Munsell's testimony, plaintiff introduced no additional evidence to show defective design or unreasonable dangerousness. Thus, we conclude there was an inadequate residuum of evidence that could support a reasonable jury verdict favoring plaintiff's product liability claim.

IV

The district court's grant of judgment as a matter of law in favor of defendant is **AFFIRMED**.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-99-14-C

[August 29, 2000, Filed]

CHRISTI ALFRED, Individually,)
Plaintiff)
)
v.)
)
CATERPILLAR INC.,)
Defendant)
)

ORDER

"Plaintiff's Motion to Reconsider Judgment entered for the Defendant with Combined Motion for a New Trial" is denied as it is without legal or factual foundation. All matters asserted within the motion were fully considered by the Court at the time the ruling was entered. There is nothing in plaintiff's motion which raises new matter or which persuades the Court contrary to its initial ruling.

Accordingly, plaintiff's motion to reconsider or in the alternative for new trial is denied.

IT IS SO ORDERED this 29th day of August, 2000.

/s/_____
ROBIN J. CAUTHRON
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-99-14-C

[August 15, 2000, Filed]

CHRISTI ALFRED,
Plaintiff

vs.

CATERPILLAR, INC., a/k/a and/or d/b/a as CAT, a/k/a and/or d/b/a CAT, a foreign corporation,
Defendant

JUDGMENT IN A CIVIL CASE

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XXX **Decision by Court.** This action came to trial or hearing before a jury. Following the close of plaintiff's evidence a decision has been rendered by the Court. Fed R. Civ. P. 50(a).

IT IS ORDERED AND ADJUDGED that judgment be, and hereby is, awarded to defendant.

8-15-00
Date

ROBERT D. DENNIS
Clerk

/s/_____
(by) Deputy Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. Civ-99-14C

[Filed August 14, 2000]

CHRISTI ALFRED, Individually Plaintiff v. CATERPILLAR®, INC., a/k/a and/or d/b/a/ as CAT®, a/k/a/ and/or d/b/a as CAT, a foreign corporation, Defendant.	))))))))))

ORDER APPROVING FINAL PRETRIAL REPORT

On this 11th Day of August, 2000, having conducted a pre-trial conference with the parties, and having received an agreed Pre-Trial Report, it is hereby Ordered that the Final Pre-trial Report submitted herewith is and should be APPROVED.

Such Report supercedes all previous pleadings in the case and governs in all respects the claims, witnesses and

exhibits to be presented at the trial of this case.

IT IS SO ORDERED.

/s/_____
ROBIN J. CAUTHERON
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-99-14-C

[Filed, August 11, 2000]

CHRISTI ALFRED, individually,)
Plaintiff,)
)
vs.)
)
CATEPILLAR®, INC., aka and/or)
d/b/a as CAT®, aka and/or d/b/a as)
CAT, a foreign corporation,)
Defendant.)

FINAL PRETRIAL REPORT

DATE OF TRIAL: August 14, 2000, at 9:00 a.m.

APPEARING FOR PLAINTIFF:

Thomas J. Steece,
OBA # 11531
STEECE & MATHEWS, P.C.
P.O. Box 12922
Oklahoma City, Okla. 73157-2992
(405) 943-8300

APPEARING FOR DEFENDANT:

James A. Jennings, OBA #4647
Carrie Palmer Hoisington, III, OBA #15101
HOLLOWAY, DOBSON, BACHMAN & JENNINGS
One Leadership Square, Suite 900
211 N. Robinson
Oklahoma City, OK 73102-7102
(405) 235-8593

Tom Womble
WOMBLE & COTELLESSE
1814 Memorial Drive
Houston, Texas 77006
(713) 650-6000

JURY TRIAL DEMANDED: Yes

I. JOINT PRELIMINARY STATEMENT:

This is a manufacturer's product liability case. The product is a Caterpillar AP800-B Asphalt Paver.

The case arises from injuries suffered by the Plaintiff, CHRISTI ALFRED, in 1997 when she was on active duty with the Navy and assigned to a construction battalion at the U.S. Naval Base in Rota, Spain. While she was involved in the construction of a parking lot, she suffered injuries to her right leg when she was struck by a Caterpillar AP800-B Asphalt Paver and pinned against a tree. The injuries lead to the amputation of her leg below the knee.

The Plaintiff alleges the asphalt paver is defective and

unreasonably dangerous and that it caused her injuries. Caterpillar denies that the paver is defective and unreasonably dangerous and alleges that the sole cause of the accident was the acts and/or omissions of the Plaintiff herself and/or the operator of the paver and/or the on-site supervisor who ordered her to stand between thc paver and the tree.

II. JURISDICTION AND VENUE:

The Court properly has diversity jurisdiction pursuant to Title 28 U.S.C. § 1332. Venue is proper.

III. STIPULATED FACTS:

A. This Court has jurisdiction of the parties and of the subject matter and venue is proper.

B. All parties have been correctly designated.

C. That the subject accident or incident occurred on or about the 6th day of March, 1997, at the Navy facility located in Rota, Spain. The incident occurred while the Plaintiff was stationed at the U.S. Naval Base in Rota, Spain, and during the course and scope of her duties as part of an asphalt paving battalion/crew.

IV. DISPUTED FACTS:

As Stated by Plaintiff:

A. Whether the Plaintiff, CHRISTI ALFRED, was injured as a result of the product as manufactured and/or designed and/or sold

and/or placed in the stream of commerce because of its alleged, unreasonably dangerous and/or defective conditions existing at the time of the design, manufacture, and/or sale of the subject product.

B. Whether the acts or omissions of third parties, and/or the Plaintiff, independent of a defect in the machine, caused the subject accident.

C. Whether the Defendant failed in its duties to otherwise guard and/or adequately warn the Plaintiff of the unreasonably dangerous and/or defective characteristics of the subject product which caused and/or significantly contributed to Plaintiff's accident and resulting injuries including subsequent amputation of her leg.

D. Whether the Plaintiff is entitled to recover damages against the Defendant under theories of strict product liability.

E. What amount, if any, is Plaintiff, CHRISTI ALFRED, entitled to receive from Defendant as compensatory damages.

F. What amount, if any, is Plaintiff, CHRISTI ALFRED, entitled to receive from the Defendant as punitive damages.

G. Was the subject product defective and unreasonably dangerous at the time it left the hands of the Defendant.

H. Was the subject product provided to the ultimate user and/or consumer, including the U.S. Navy and Naval Institution where CHRISTI ALFRED was stationed, and provided and/or placed in the stream of commerce by the Defendant with inadequate warnings and/or improper warnings and/or without warnings concerning the defective design and unreasonably dangerous conditions or characteristics existing in the subject product at the time that it was placed in the stream of commerce by the Defendant.

I. Was the product provided to the ultimate user and/or consumer, including the U.S. Navy, and in particular the crew wherein CHRISTI ALFRED was working with the subject product, provided and/or placed in the stream of commerce by the Defendant with inadequate guards and/or lack of guards which made the product defective in the design and/or unreasonably dangerous in condition and/or characteristics existing in the subject product at the time that it was placed in the stream of commerce by the Defendant?

J. If the product in question is defective and/or unreasonably dangerous, did it cause and/or significantly contribute to the injuries and/or damages of CHRISTI ALFRED.

As Stated by Defendant:

1. Is the product in suit defective?

2. Is the product in suit unreasonably dangerous?

3. If the product in suit was defective and unreasonably dangerous, was it a direct cause of the plaintiff's injuries?

4. Was the sole cause of the plaintiff's injuries something other than a defect in the product, i,e., the acts and omissions of the plaintiff herself, the paver operator and/or the on-site supervisor?

5. What is the nature and extent of the plaintiff's injuries?

6. What damages, if any, is the plaintiff entitled to recover?

7. Is the plainfiffentitled to recover punitive damages? If so, in what amount?

V. LEGAL ISSUES:

A. Is the Defendant entitled to assert all of the defenses and/or affirmative defenses asserted by the Defendant in this case?

B. Are punitive damages recoverable by the

Plaintiff in this case?

C. Is the Plaintiff entitled to recover as damages the value of medical care furnished by the Navy at no additional cost to her?

VI. CONTENTIONS AND CLAIMS FOR DAMAGES OR OTHER RELIEF SOUGHT:

A. PLAINTIFF:

1. That the Plaintiff's injuries and damages were caused by the acts and/or omissions of the Defendant, CATERPILLAR, INC, That the Defendant, CATERPILLAR, INC., placed into the stream of commerce a product that was defective and unreasonably dangerous. That said product failed to contain proper and adequate safety features and/or devices, including components to prevent the subject incident and Plaintiff's resulting injuries and damages. That further, said product was defective and unreasonably dangerous in that it failed to contain adequate warnings to alert Plaintiff and/or an operator of the subject product of the dangers associated With the subject product. Defendant reasonably did or could have foreseen that such an incident as occurred to Plaintiff would and/or could occur and injure a person such as the Plaintiff at the time Defendant designed, manufactured and/or placed the product in the stream of commerce.

2. That Plaintiff's injuries and damages were directly caused by the defective and/or unreasonably dangerous product as manufactured, designed, distributed and/or sold by the Defendant. The Plaintiff alleges that the subject product was defectively designed and/or manufactured and unreasonably dangerous at the time it was manufactured and/or left the control and/or possession of Defendant. Plaintiff alleges that the subject product was a special order item or designed for use by the U.S. Government for the specific use it was being used at the time of the incident.

3. That as a direct result of the acts and/or omissions of the Defendant, CATERPILLAR, INC., the Plaintiff has experienced and sustained serious disfiguring and permanent bodily injury. Plaintiff has incurred and will incur in the future physical and mental pain and suffering. Plaintiff has incurred reasonable and necessary medical and/or medically related care and treatment and expense for reason,able and necessary medical and/or medically related care and treatment in the past and will incur same in the future for injuries sustained in the subject accident. Plahatiff has sustained loss of enjoyment of life in the past and will sustain such loss in the future. Plaintiff has sustained loss of earnings and/or earning capacity in the past and will sustain such loss in the future. That all the above

damages and/or losses are extensive and Plaintiff is entitled to actual damages as against the Defendant in a sum in excess of Seventy-Five Thousand ($75,000.00)
Dollars to be determined by the trier of fact.

4. That the acts and/or omissions complained of hereinabove were engaged in by Defendant, CATERPILLAR, INC., as the designer and manufacturer of the subject product, knowingly, willfully, recklessly and/or with wanton disregard that the subject product was unreasonably dangerous an defective at the time the subject product was designed, manufactured and/or sold and placed into the stream of commerce. That Plaintiff is entitled to punitive damages as against Defendant, CATERPILLAR, INC., for a sum in excess of Seventy-Five Thousand ($75,000.00) Dollars, to be determined by the trier of fact.

B. DEFENDANT:

1. The product in suit is neither defective nor unreasonably dangerous.

2. The product is appropriately designed in accordance with the state of the art and applicable industry standards.

3. The Plaintiff's injuries were solely caused by something other than an unreasonably dangerous defect in the product, including the

acts and omissions of the on-site supervisor, the paver operator and/or the Plaintiff, herself.

4. There is no evidence in the record which gives rise to a legally cognizable claim of punitive damages and therefore, the claim of punitive damages should not be submitted to the jury.

VII. EXHIBITS:

A. Stiplated Exhibits:

1	Caterpillar Invoice to Zahid Tractor for sale of machine, March 25, 1991, serial number IBF00256	Stipulated
2	AP-800B Asphalt Paver Brochure	Stipulated
3	Product Training Bulletin QECB8059 (May 1990)	Stipulated
4	Operation & Maintenance Manual for AP-800B asphalt paver	Stipulated
5	Operation & Maintenance Manual VIP 8 and 10 Foot Asphalt Screeds	Stipulated
6	Parts Manual for AP-800B asphalt paver	Stipulated
7	Department of the Navy investigation of plaintiff's accident,	Stipulated

	including enclosures and attachments	
8	Brochure: Asphalt Paver Principles and Techniques	Stipulated

B. Plaintiff's Exhibits

NO.	DESCRIPTION OF EXHIBIT	OBJECTION	RULE RELIED UPON
1	Medical expense statements, statements, reflecting the value of services rendered to plaintiff for injuries and damages sustained in the subject accident,	Reserved until specifically identified and produced.	
2	Patents or applications for patents relative to the subject paver and/or its components which were produced in discovery to Defendant by Plaintiff.	Yes	401,402, 403,801, 802
3	Christi Alfred's medical records	Yes	401,402, 403,801, 802
4	File of William Munsell and Exhibits to the deposition of William Munsell	Yes	401,402, 403,801, 802
5	Photographs and materials	Yes	401,402,

	relating to other equipment referred to in the report and deposition of William Munsell		403,801, 802
6	All documents produced by the parties in discovery	Yes. Not specifically identified	
7	All exhibits listed by Defendant and not objected to by Plaintiff	Yes. Not specifically identified	
8	All deposition exhibits not otherwise objected to by Plaintiff	Yes. Not specifically identified	
9	4 Photos of Plaintiff, before/after accident	Yes. Not specifically identified	401,402, 403, Cumula-tive

B. DEFENDANT:

NO.	DESCRIPTION OF EXHIBIT	OBJECTION	RULE RELIED UPON
1	Bill of Lading for machine		
2	DOD Property Record for machine		
3	Krenek Photos of Exemplar Paver	Yes	401,402,

			403, 701, 702, 801, 802
4	Krenek Articles and Literature a. New Horizons for Human Factors in Design b. Human Factors in Engineering and Design c.Human Factors Design Handbook, 2d Ed.		
5	Defendant's photographs and video of exemplar paver	Yes	401,402, 403,801, 802, Cumulative Foundation
6	Caterpillar Safety Design Guide	Yes	Objection to document as not representative of all materials requested in discovery
7	Demonstrative photographs, videos, charts, and other exhibits developed by Caterpillar's experts	Objection to anything not previously seen	
8	Exemplar paver control panel	No objection to this document. Objection to	401,402, 403,701, 702,801, 802

		Defendant's statement that there are no more relevant safety materials for this product.
9	All exhibits listed by Plaintiff and not objected to by Defendant	Reserved until identified
10	All exhibits to the depositions of Defendant's experts	Reserved until identified.

VIII. WITNESSES:

No unlisted witness will be permitted to testify as a witness in chief except by leave of Court when justified by exceptional circumstances.

A. PLAINTIFF:

Name and Address	Proposed Testimony
1. Christi Alfred, now, Christi Lindsey 1400 N. 16th, #306 Chickasha,OK	Allegations in Complaint. Witness will testify concerning all matters pertaining to her to her medical condition and expenses therefor. Witness will testify concerning other

	will testify concerning other facts and/or issues which witness is otherwise qualified to offer by way of testimony in this case.
2. Don Huggins Associate Prosthetics Oklahoma City, OK	Witness will testify concerning the nature and extent of the injuries and damages sustained by Christi Alfred in the subject accident. Witness will testify concerning the medical treatment and procedures to which Christi Alfred was subjected as a result of the subject accident. Witness will testify as to the reasonableness of the expenses for the medical care and treatment received by Plaintiff. Witness will testify as to other relevant issues in this case.
3.Various treating doctors or physician's assistants at V.A. Medical Center, Oklahoma City, OK A. Michael Kuns, P.A.	Witness will testify concerning the nature and extent of the injuries and damages sustained by Christi Alfred in the subject accident. Witness will testify concerning the medical treatment and procedures to which Christi Alfred was subjected as a result of the subject accident. Witness will testify as to the reasonableness

	of the expenses for the medical care and treatment received by Plaintiff. Witness will testify as to other relevant issues in this case
4. Virginia Harr, M.D. Southern Plains Medical 2222 W. Iowa Chickasha, OK	Witness will testify concerning the nature and extent of the injuries and damages sustained by Christi Alfred in the subject accident. Witness will testify concerning the medical treatment and procedures to which Christi Alfred was subjected as a result of the subject accident. Witness will testify as to the reasonableness of the expenses for the medical care and treatment received by Plaintiff, Witness will testify as to other relevant issues in this case.
5. Bill Munsell	Witness will testify concerning matters associated with the investigation of the events of the subject accident(s); preparation and/or presentation of any necessary exhibits or demonstrative aids or illustrations relative to the subject product and/or the subject accident(s). Witness will testify as an expert relative to the safety issues and/or any acts or omissions relative to safety issues that

were breached by the Defendant, in the design and/or manufacture of the subject product. Witness will testify regarding matters associated with accident reconstruction issues in this case. Witness will testify concerning other issues and/or evidence in this case which this witness is otherwise qualified to render by expert opinion testimony, Witness will prepare a final report of his opinions pursuant to the Court's Scheduling Order and/or other Court requirements. It is anticipated that said expert report will establish that liability for the subject accident lies completely and wholly with the Defendant. Per deposition.

6. Steve Lindsey — Husband of Plaintiff. Will testify to Plaintiffs' condition and damages.

7. Any and all witnesses of the Defendants whether or not called by Defendant at the time of trial and not otherwise objected to by this Plaintiff.

8. Employees and Enlistees ofNavy identified in incident reports and not otherwise objected to by Plaintiff.

**Defendant objects to any witness not specifically listed by name, and for whom the opportunity for deposition was not

presented before the close of discovery.

B. DEFENDANT:

Name and Address	Proposed Testimony
1. SWCS Giardina, Battalion Safety Officer Address Unknown	Giardina will testify concerning his investigation and the tests conducted on the subject paver on 03/10/97.
2. Keith Schmidt Caterpillar Paving Products, Inc.	Deposed.
3. Ron Wilson Caterpillar Paving Products, Inc.	Deposed.
4. Richard Krenek, Ph.D	Deposed.
5. All witnesses listed by Plaintiff and not otherwise objected to by Defendant	

IX. ESTIMATED TIME FOR TRIAL:

For liability: 2 days For damages: 1 day

X. BIFURCATION REQUESTED:

_X_ Yes. Defendant requests bifurcation. Request overruled by Court.

XI. POSSIBILITY OF SETTLEMENT:

Good___ Fair___ Poor_X_

All parties approve this Report and Respectfully request the court to approve and make this the final Order for trial. The parties understand and agree that this Order supercedes all pleadings, shall govern the conduct of the trial and shall not be amended except by order of the Court.

BY: /s/_____
Thomas J, Steece by CPH with approval
Mark Mathews
STEECE & MATHEWS, P.C.
Post Office Box 12992
Oklahoma City, Oklahoma 73157-2992

BY: /s/_____
James A. Jennings, OBA #15101
HOLLOWAY, DOBSON, BACHMAN & JENNINGS
One Leadership Square, Suite 900
211 North Robinson
Oklahoma City, Oklahoma 73102
(405) 235-8593
(405) 235-1707 (Fax)

AND

Tom Womble
WOMBLE & COTELLESSE
1814 Memorial Drive
Houston, Texas 77006
(713) 650-6000

ATTORNEYS FOR CATERPILLAR INC.

APPENDIX G

TRIAL TRANSCRIPT
August 14, 2000
Bench Order

THE COURT: Call your next witness

MR. STEECE: Your Honor, at this time the plaintiff would rest.

THE COURT: Counsel, approach the bench, please.

(THE FOLLOWING PROCEEDINGS WERE HAD AT THE BENCH, OUT OF HEARING OF THE JURY:)

MR. JENNINGS: Are you ready for me?

THE COURT: Uh-huh.

MR. JENNINGS: Your Honor, comes now the defendants, all Caterpillar entities as involved in this case, and move for judgment as a matter of law under Rule 50 on the grounds and for the reason that the evidence, when taken in the light most favorable to the plaintiff, does not establish a prima facie basis for the elements of their cause of action.

I would move simultaneously that the testimony of the expert, Mr. Munsell, be stricken under Daubert vs. Merrell Dow, 509 U.S. 579, and Kumho Tire Company vs. Carmichael, 119 South -- or 119 Supreme Court 1167. It is precisely the kind of junk science that those two cited cases

and Federal Rule 702 are intended to exclude.

Under the testimony of the witness Munsell, he is not qualified, by experience or training, to address the issues he has addressed. The issues which we have here are human factors issues. He is not a human factors engineer. Moreover, he did nothing, did insufficient work to offer the opinions which he offered, insufficient work to cause them to be reliable to the extent required for the Court to consider them.

He testified he never saw the paver in the suit. He never saw one in use under any circumstances. He has only seen one paver in his entire life, It is not the type of paver involved in this case. He did not study the paving process to acquaint himself with the controls and the significance of those controls so he could fairly evaluate the controls. He didn't do testing of any kind to determine whether the theory he offered had any scientific validity. He did no scientific research, and there is a body of research out there on the subject, but he did no research to establish that his theory was valid or had the sufficient level of reliability. So, two things: We move the Court to strike the testimony of Mr. Munsell and move the Court to enter judgment in favor of the defendants as a matter of law.

THE COURT: Your response on the motion to strike.

MR. STEECE: On the motion to strike Mr. Munsell's testimony, I believe Mr. Munsell is indeed qualified to offer the opinions he gave in this case based on the mechanical engineering theories and opinions he gave relative to the design and defects of the unreasonably dangerous nature of the machine.

The human factors issues are, I do not believe, opinions he expressed in this particular case. He answered questions relative to human factors issues, particularly the cross-examination questions of counsel, but he did not offer any opinions relative to the human factors. He offered opinions relative to the design of the particular product.

THE COURT: I'm not sure I understand what is meant by the term "human factors." The witness conceded that was a separate area of engineering, that was not his area of engineering. As I understand or can summarize his expert opinion, it was based primarily on the counter-intuitiveness of the controls, which sounds to me like a human factor, I invite you to convince me to the contrary.

MR. STEECE: Your Honor, Mr. Munsell relied upon SAE standard J297 which is a mechanical engineering directive or guideline. As counsel argued, a guideline, but we believe that is an industry-accepted practice for the design of this product. It is a mechanical engineering theory, not a human factors theory. The mechanical engineering theory requires that that particular control panel use a different mechanism than what was used. If used, the different mechanism, this would not have occurred. That's Mr. Munsell's opinions in this case and that's part of his criticism that makes it unreasonably defective and unreasonably dangerous.

In investigating the work he has done in the last five years, human factors is an overlapping area relative to mechanical engineering, design engineer. It's not something, as he testified, you can draw a line between the disciplines. There is some interaction between the disciplines.

From the standpoint of any, quote, human factors issues that might overlap into the mechanical engineering areas, Mr. Munsell's expertise, relative to opinions in this case, those intuitive natures are what were addressed in that particular standard, SAE standard 297, that any control devices for speed or direction should be generally in a forward or upward -- for going forward or rearward or backwards for reverse. Those standards are mechanical standards that may otherwise overlap in areas that are, quote, human factors.

All his opinions are mechanical, engineering opinions based in his areas of expertise that have some overlap. There can't be any doubt; there has to be some overlap into human factors.

I believe that the defendant's challenge under Daubert and Kumho is not well-founded, and that Mr. Munsell can offer his opinions. They over that those opinions go to the defects in this particular case and human factors is simply an overlap in the area of mechanical issues that deal with the design of this particular product.

MR. JENNINGS: The witness conceded it is a human factors issue at the outset. He conceded that there is a body of scientific data out there on the subject. He admitted he did not consult it and he admitted he did not do any independent testing. He didn't testify about any testing he has done. It's not sufficient to simply come in and say, "Oh, I believe it's not intuitive. There ought to be a different way." That is precisely the kind of thing that lends itself to scientific analysis arid testing, and that's the type that has been done. It's in the world. He just didn't know anything about it.

So, it seems to me this is a perfect case in which the Court, acting as gatekeeper, should exclude that evidence and conclude the matter.

THE COURT: Well, I am inclined to agree with you but I want to make sure that I recall the relevant testimony and the standards because I wasn't, frankly, sure which one was being referred to at any given time. The one that you went over with him, Mr, Jennings, regarding if there is a certain *kind* of control provided, it should be that way, which standard was that or was that all of them?

MR. JENNINGS: It was J297 was the standard. Somewhere 1814 is the recoommended, practice. But the one which included the language you're talking about is 297, Judge.

THE COURT: There was other language that said the particular machine in question had to be evaluated.

MR. JENNINGS: Yes. That was the 1814. Both standards -- both documents, both the standard and the recommended practice, are, by their terms, guidelines, in any event. They're not subject to violation in the way a law is. They're both guidelines.

THE COURT: I want to give you a chance to think about whether you really want to win this motion. Often you make these just for the record but I think this one you need to think about whether you want to win it.

MR. JENNINGS: Shall we recess until tomorrow?

THE COURT: Do you want that long to think it over?

MR. WOMBLE: Yeah.

THE COURT: I don't want to make this jury come back tomorrow morning if I'm going to let them go.

MR. WOMBLE: I can't hear a word she's saying, so I don't care -- I do care, but I can't hear anything.

MR. JENNINGS: I can tell you this, Judge, that we are a little surprised with the quickness with which the case has proceeded. From a logistical standpoint, it would be helpful for us to not begin our proof until tomorrow, I think.

MR. WOMBLE: We'll certainly finish tomorrow

MR. JENNINGS: But, otherwise, --
THE COURT: I can give you a 20-minute recess now, I know your corporate representative is one of your listed witnesses. I can take this under advisement and let you start with that witness. I truly do not want to bring this jury back to send them home first thing tomorrow.

MR. JENNINGS: I understand.

THE COURT: What is your choice?

MR. JENNINGS: What do you want to do?

MR. WOMBLE: Did she say a 20-minute recess?

MR. JENNINGS: Uh-huh.

MR. WOMBLE: I'm trying to read lips here.

THE COURT: Is that what you want?

MR. JENNINGS: Yes. Thank you.

(THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT AND WITHIN THE PRESENCE AND HEARING OF THE JURY:)

THE COURT: Members of the jury, sometimes our best-laid plans go astray. Rather than have you sit and watch us whimper any longer, I'm going to give you a recess. I realize you just had one, but you can drink another coke. Please be in the jury assembly room at five after 4:00. We will call for you at that time. Remember my instruction not to discuss the case and we will excuse you.

(THE JURY WAS EXCUSED FROM THE COURTROOM, AFTER WHICH THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT:)

THE COURT: I think it's clear from our discussion what needs to be done. I'll ask that, Mr. Jennings, you let me know in chambers and let Mr. Steece know as well by 3 o'clock what your intention is.

Thanks. 4 o'clock.

If your intention is to go forward and withdraw your motion at this time, then I trust you have a witness you can proceed with this afternoon even if we don't go until 5 o'clock.

MR. JENNINGS: Yes, ma'am.

THE COURT: We can use that time with counsel to start on instructions, as apparently they'll be needed sooner than we thought. Please let me know by 3 o'clock what your intentions are. If you wish to pursue your motion, then we will reconvene in open court without the jury present. I will ponder from now until then.

We'll be in recess.

(A RECESS WAS TAKEN, AFTER WHICH THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT, OUT OF THE PRESENCE AND HEARING OF THE JURY:)

THE COURT: Mr. Jennings has announced to me the defendant's intent to pursue its motion. Is there anything either counsel would like to add before I rule?

MR. JENNINGS: No.

MR. STEECE: The only thing else I would like to add is in the deposition conducted of Mr. Munsell back in this case on May 12th of this year, counsel did make inquiry in that case as to human factors issue with Mr. Munsell. Again, the fact that it overlaps with the mechanical engineering aspects of his testimony relative to the defects in this product to make it unreasonably dangerous and defective.

The plaintiff would also object to the timeliness of this motion at this time. Anticipating knowing what Mr. Munsell's testimony was going to be, the defendants had inquired and

should have made a formal motion of the court prior to this so we could otherwise have had the opportunity to adequately respond to this challenge to cite authority and to otherwise express the opinions Mr. Munsell offered in this case and show that they are in compliance with what is expected an expert could testify in these areas and they are not subject to a Dauber or Kumho Tire challenge.

THE COURT: You all may be seated. I'm sorry I didn't say that. I wondered why everyone was still standing.

Mr. Steece, I had understood the witness to say he was not and did not profess to be an expert in human factors analysis. Is that your understanding?

MR. STEECE: He is not, per se, an expert in human factors or human factors analysis. However, the area he is an expert in has overlap with human factors issues, and I believe he testified to that, Your Honor.

THE COURT: Are you asking for additional time to respond to this motion, or are you simply objecting to its timing?

MR. STEECE: Your Honor, I would appreciate the opportunity to be able to try to respond to their motion more thoroughly than just based on this oral motion under Daubert and Kumho Tire, but I realize the restriction we've got with this trial.

THE COURT: Well, I am aware of no prohibition against moving to strike testimony rather than moving in limine ahead of trial. Often it's easier once the testimony has been given and more efficient rather than having a full-blown

hearing where the witness testifies ahead of trial in order to establish the credentials of his opinion.

Mr. Munsell gave an opinion that was very limited and it was backed by very little work and very little expertise. I think Mr. Jennings has covered all that at the bench and it need not be repeated.

The only actual investigation that he did was to find a machine that had the lever rather than the dial in order to satisfy himself that it was possible, and to identify for the benefit of the jury the guidelines and standards on which he based his conclusion.

Aside from identifying those guidelines and standards, however, he has done no work that supports his conclusion that they are prohibited, that the design of this machine is defective, or that the guidelines and standard apply even to the mechanics of this machine.

I could give you, I think, Mr. Steece, from now until next week to respond to the motion. It is not the law. I believe I am fairly clear what the law requires. But the facts of this particular witness's particular opinion and the analysis and investigation that went into it, that is suspect, and I believe right now, after we've all had the benefit of his testimony and it's fresh in everyone's mind, is the best time to rule on this.

I find that his opinion is simply not competent under Daubert and other cases construing Daubert; that it is not supported by sufficient testing, experience, background, education, or thought to be relied upon by this jury. Without that opinion, I think it's quite clear that there is no evidence

on which this case can go to the jury, and it is for those reasons and on that basis that I grant the defendant -- first, the defendant's motion to strike the expert testimony and, secondly, its Rule 50 motion for judgment as a matter of law. That concludes the case.

Ms. Lindsey, I'm sure you understand or I hope that you understand that it's simply a ruling of law that I'm required to make and certainly does not indicate that me or anyone else is not completely sympathetic to your injuries, and I am sorry, but I think it's required as a matter of law, and I so rule.

I will inform the jury by telling them in the jury assembly room what I have done and sending them home.

Is there anything else from counsel? Mr. Steece?

MR. STEECE: Your Honor, just for the record, to note plaintiff's objection to defendant's motion for verdict under Rule 50. I don't believe we responded to that. For the record, we object to that also.

THE COURT: Do you want -- I'm sorry. You're exactly right. I should have given you an opportunity. Do you have any argument to make?

MR. STEECE: Your Honor, I believe the evidence presented by the plaintiff in this case does support this case going forward. The plaintiff has satisfied the prima facie elements of this case to otherwise have the case submitted to the jury and believe that the case, if submitted to the jury, would result in a verdict for the plaintiff and we would so

move that the case move forward and to overrule the defendant's motion.

THE COURT: Well, if I wasn't clear, my finding is that without the expert opinion of Mr. Munsell, there is no proof of a defect or a defect that makes the product unreasonably dangerous and that is the basis for the Rule 50 motion.

Counsel will please take custody of the exhibits, we do not keep them. You have to keep them yourself for any appeal purposes.

Is there anything else from defendant?

MR. WOMBLE: No, Your Honor.

THE COURT: We'll be adjourned.

(PROCEEDINGS CLOSED)

APPENDIX H

TRIAL TRANSCRIPT
August 14, 2000
Cross Examination Expert Witness

WILLIAM PAUL MUNSELL - CROSS (By Mr. Jennings)

the accident?

A. Sure.

Q. That's why it went forward?

A. Right. And he was asked to come forward and then stop. And the first thing you do in the stopping procedure is not to flip the switch forward and reverse; the first thing you do in the stopping procedure is to turn the dial counterclockwise.

Q. If Mr. Worstell had the machine in forward rather than
reverse, this accident would not have happened; right?

A. Wrong.

Q. Wrong? Okay.

Well, let's come back to these controls in a few minutes. Before we move away from it for the moment, your criticism relates to this dial control right here?

A. Yes, that variable speed control.

Q. If you turn it clockwise, or to the left, you have a turtle down here that says "slow," and then you turn it clockwise and the numbers get bigger and it comes around here to the rabbit.

A. You just made the mistake that Mr. Worstell said. You said to turn it clockwise down to the rabbit -- or down to the little turtle.

Q. Let's be clear.

A. You said "clockwise" actually both ways.

Q. Let's be clear. If you turn it clockwise, the numbers get bigger on the dial, don't they?

A. Yes. That's not what you said the first time. You got it backwards, just like he did.

Q. If you turn the dial clockwise, which is to the right, the numbers get bigger. They go from 2 around to 4 to 6 to 8?

A. That is correct.

Q. You go from slow around to fast; correct?

A. Yes.

Q. This is the control which you say is counter-intuitiue; correct?

A. That's right.

Q. Okay. Now, let's be clear about who you are, Mr. Munsell, and what your role here is today.

A. All right.

Q. You're here in this case because you were hired by Ms. Lindsey's lawyers to appear as a witness; correct?

A. That's right.

Q. That's what you do for a living; you consult with lawyers and testify in lawsuits?

A. Yeah, that's most of the business. Some of the business is with insurance companies that want to know if they need to pay a claim. Some of them are manufacturers who want to know what's wrong with their process. But most of them are lawyers who have failures that they bring to me.

Q. 90 percent or more of what you do is do investigations and

APPENDIX I

FOR THE U.S. WESTERN DISTRICT OF OKLAHOMA

Local Court Rules
Rule 16.1
Effective May 1, 1998

Court upon request. Failure to use said forms or to supply the Court with the equivalent information required by the forms will result in the pleading being ordered stricken.

Petitioners or movants seeking postconviction relief shall send or deliver to the Clerk the original and two copies of the petition or motion. Plaintiff submitting complaints for civil rights relief must submit the original and one copy of the complaint for the Court and one copy for each of the persons named as defendant in the complaint. If tendered for filing by mail, petitions, motions or complaints should be addressed to the Clerk of the Court at an address designated by the Clerk.

Upon filing of a petition or motion for postconviction relief or civil rights complaint, as contemplated by this local rule, the Clerk shall mail a copy of the petition or motion, together with a notice of its filing, to the appropriate State Attorney General involved or the United States Attorney for the Western District of Oklahoma. The filing of such petition or motion shall not require an answer or other responsive pleading unless the Court orders otherwise.

LCvR16.1 Pretrial Procedures.

(a) Status and Scheduling Conferences.

(1) **Preparation for Status and Scheduling Conferences**. Prior to the fast status and scheduling conference, trial counsel for all parties, and pro se parties, if any, shall confer and prepare a Joint Status Report. This conference may be combined with. the discovery conference required by Fed. R. Civ. P. 26(f), The Joint Status Report shall include, to the extent then known, the contentions of each party and the issues of fact and law. It shall also contain a list of all exhibits, witnesses, and discovery materials to the extent, then known, together with time estimates to complete discovery and trial. It shall be the duty of counsel for the plaintiff or pro se plaintiff to arrange this joint preparation and the duty of all counsel and pro se parties to jointly participate in and facilitate it. The information exchange shall be incorporated into the Joint Status Report. This Joint Status Report will be prepared and signed jointly and filed as a single document with the Clerk of the Court no later than seven (7) calendar days prior to the status and scheduling conference. The parties shall file their discovery plan as required by Fed. R. Civ. P. 26(t) prior to or simultaneously with the Joint Status Report. (The Joint Status Report shall conform to the form provided herein as Appendix II and include the alternative dispute resolution information and requirements set forth in LCvR 16.3(c).)

(2) **Required Attendance at Conference**. Counsel with authority to make appropriate decisions and pro se litigants shall attend any conference required by the Court. When justified by the circumstances, the Court may allow counsel to participate in such conference by telephone. Pro Se litigants and counsel shall be prepared to discuss all

relevant matters numerated in .Fed. R. Civ. P. 16(c).

(3) **Expedited Cases**. Unless the Court orders otherwise, the categories of proceedings that are exempt from thc initial disclosure requirements as identified in Fed. R. Civ. P. 26(a)(1)(E) and actions and proceedings commenced by the United States for forfeiture and/or debt collection shall be exempt from the pretrial procedures prescribed by this Rule.

(b) Pretrial Responsibilities.

(1) Preparation of Status Reports, Final Pretrial Reports, and Other Orders.

(A) Unless otherwise ordered by the Court, counsel for the plaintiff, with full and timely cooperation of other counsel and pro se parties, is responsible for preparing, obtaining approval of all parties, and furnishing the Court any status reports, pretrial reports or other pleadings required by the Court or these local rules.

(B) The clerk who keeps the minutes of the status and scheduling conference shall have forms available conforming to the form provided herein as Appendix III, whereby the time and/or date fixed by the Court for the performance of specified duties may be inserted. Upon request, counsel will be supplied with a copy of such form so that they may make their own notations of deadlines and of other orders prescribed by the judge presiding over the conference. Such executed form, when approved by the Court and filed, shall constitute the order of thc Court as to such, schedules without the necessity of filing any other order to the same effect. Unless otherwise directed by the assigned judge, the form and content of a jointly prepared, proposed, Final Pretrial Report,

conforming to the sample form, provided herein as Appendix IV, shall be filed by plaintiffs counsel on or before the first day of the month that the case is scheduled for trial. Plaintiffs counsel shall file with the Court the jointly prepared Final Pretrial Report along with an extra copy for thc Court and shall be accompanied by a proposed order approving the Report. The executed Pretrial Report, when approved by the Court, shall constitute an order of the Court as to all matters contained therein.

(2) **Default**. Failure to prepare and file a required status report, failure to comply with the Final Pretrial Report, failure to appear at a conference, appearance at a conference substantially unprepared, or failure to participate in good faith may result in any of the following sanctions: the striking of a pleading, a preclusion order, stay of fine proceeding, default judgment, assessment of expenses and fees (either against a party or the attorney individually), or such other order as the Court may deem just and appropriate.

LCvR1.6.2 Judicial Settlement Conferences.

(a) **Purpose**. The purpose of the judicial settlement conference is to permit an informal discussion between the attorneys, parties, and the setllement judge on every aspect of the case bearing on its settlement value in an effort to resolve the matter before trial.

(b) **Referral and Scheduling the Settlement Conference**. All civil cases set on a trial docket are automatically set for settlement conference before the settlement magistrate judge. Also the Court may, upon its own motion or on the request of any of the parties, set a settlement conference at any practicable time. The conference

hall be held before the settlement magistrate judge, any magistrate judge or district judge other than the judge assigned to the case.

(c) **Attendance Requirements**. The lead attorney who will try the case for each party shall appear, and shall be accompanied by one with full settlement authority. The latter will be the parties if natural persons, or representatives of parties which are not natural persons, but maynot be counsel (except in-house counsel) or a person who is not directly or actively associated with the party or parties. Other interested entities such as insurers or indemnitors shall attend and are subject to the provisions of this Rule. Governmental entities and boards shall send a representative and counsel who, together, are knowledgeable about the facts of the case and the governmental units or board's position, and have, to the greatest extent feasible, authority to settle.

Only the settlement judge may excuse attendance of any attorney, party or party representative. Any party excused from appearing in person shall be available to participate by telephone, if required. Failure to attend the settlement conference or failure to cooperate fully, may result in the imposition of sanctions in accordance wilh LCvR16.1 (b)(2) and Fed. R.Civ. P. 16(f).

APPENDIX J

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
APPEAL NUMBER: 00-6317

CHRISTI ALFRED, individually,	)
APPELLANT,	)
	)
v.	)
	)
CATERPILLAR®, INC., a/k/a	)
and/or d/b/a as CAT®, a/k/a and/or	)
d/b/a as CAT, a foreign corporation,	)
APPELLEE.	)
	)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
THE HONORABLE JUDGE ROBIN J. CAUTHRON

BRIEF FOR THE APPELLANT

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ATTORNEYS FOR APPELLANT

ORAL ARGUMENTS RESPECTFULLY REQUESTED

JURISDICTIONAL STATEMENT

COMES NOW the Appellant (hereinafter "Plaintiff"), and hereby appeals to the United States Court of Appeals for the Tenth Circuit, the judgment entered against her on August 15, 2000 which disposed of all her claims. Plaintiff takes her appeal from the United States District Court for the Western District of Oklahoma. The case was filed in the United States District for the Western District of Oklahoma based on diversity of parties. The Plaintiff is a resident of Oklahoma and the Appellee (hereinafter "Defendant") is a corporation with its incorporation and its principle place of business outside of Oklahoma. Subject matter jurisdiction based on diversity of citizenship requires complete diversity. *Caterpillar, Inc. v. Lewis*, 117 S. Ct. 467, 472 (1996). Since complete diversity of citizenship exists between the parties and the matter in controversy exceeds $75,000, the Western District Court for the State of Oklahoma exercised jurisdiction

over all claims by the Plaintiff. 28 U.S.C. §1332 (1994). This appeal is from the Western District Court for the State of Oklahoma and is a judgment that disposed of all Plaintiff's claims, therefore this Court does have appellate jurisdiction as a matter of law. *Federal Rules of Appellate Procedure* (FRAP 3).

Judgment was entered against the Plaintiff on August 15, 2000 and within 10 days on August 25, 2000, Plaintiff filed a motion to reconsider judgment entered for the Defendant with combined motion for a new trial. This filing tolled the time of filing the Notice of Appeal until the District Court disposed of the motion. *Federal Rules of Appellate Procedure* (FRAP 4(a)(4)(A)(v)). On August 29, 2000 the District Court denied both of Plaintiff's motions and entered judgment against her motions accordingly. Plaintiff next filed her Notice of Appeal on September 11, 2000 within the thirty day requirement of Federal Rules of Appellate Procedure (FRAP 4(a)(1)). The Docketing Statement required by 10th Circuit Rule 3.4 was filed within 10 days of filing the Notice of Appeal. Plaintiff therefore submits that her appeal is timely, that the Tenth Circuit Court of Appeals has jurisdiction over the subject matter of this case, and that the review of this case should be based on an abuse of discretion standard.

ISSUE PRESENTED FOR REVIEW

1. Did the District Court misapply the *Daubert* and *Kumho* rules to the facts presented in this case?

STATEMENT OF THE CASE

Plaintiff, in the above captioned case, brought suit against the Defendant, under a manufacturer product liability theory for defective design. Plaintiff presented four (4) witnesses in support of her case to the Court. Plaintiff's counsel, Mr. Thomas J. Steece, called the Plaintiff to the stand as the first witness. Plaintiff offered relevant testimony regarding both issues of liability and damages. Next, Plaintiff's counsel called a prosthetic expert who testified as to relevant issues of Plaintiff's injuries and resulting below the knee amputation; his experience and challenges in treating and fitting Plaintiff with various prosthetic devices; and the long term care that the Plaintiff would be required to undergo in an attempt to return to everyday activities. Plaintiff's counsel next called her liability expert to the stand where he there presented two (2) basic opinions. First, that the controls function dial and/or switch on the Defendant's control panel of the road paver, which was at issue, caused and/or contributed to the accident in question. For that opinion, Plaintiff's expert relied upon review of witness' testimony, review of the operator's manual for the product, applicable standards and nine (9) years of investigating industrial accidents and/or accidents where allegations are that individuals are injured by products or conduct of other persons or entities. Second, that the control designed and manufactured by the Defendant for this particular off road paver was unsuitable for the Defendant's road paving machine. For that opinion, Plaintiff's expert relied on the Society of Automotive Engineers (SAE) Handbook, and specifically standard J 297, with which he concurred, as well as review of statements and applicable standards. He went on to state in his testimony that the SAE is within the purview of

a mechanical engineers to consult and rely upon in reaching and rendering opinions relative to the issues in this case. Plaintiff's expert also relied, in part as to the formulation of his opinions, to the Navy's investigation file and report of the subject incident entered as Court's exhibit number seven (7). Plaintiff's final witness-in-chief was her husband who testified as to certain observations the he has made relative to damages that the Plaintiff has suffered.

Plaintiff closed her evidence and Defendant's counsel moved for Judgment as a Matter of Law under the Federal Rules of Civil Procedure Rule 50(a), and to strike the testimony of Plaintiff's expert, Bill Munsell, pursuant to the holding of the United States Supreme Court in the ***Daubert*** and ***Kumho*** cases. The District Court granted Defendant's motion while striking the testimony and disqualifying Plaintiff's expert witness. Plaintiff is now before the Tenth Circuit Court of Appeals asking it to reconsider the striking of Plaintiff's expert testimony, and the subsequent judgment against the Plaintiff, and to grant Plaintiff a new trial. Further, Defendant's motion was not timely submitted as argued by Plaintiff's counsel at trial. Therefore, for her request Plaintiff submits the following arguments and authorities.

STATEMENT OF FACTS

On March 6, 1997, the Plaintiff Christi Alfred was on active duty with the U.S. Navy. She was stationed at the U.S. Naval base at Rota, Spain and she was assigned to a construction battalion. While she was working as a groundsman on a parking lot project, giving hand signals to the operator of the road paver, she was positioned by a

supervisor between the paver and a tree. When the operator of the paver got close enough to the tree Ms. Alfred ordered him to stop and he did. When the operator began to reverse he turned the control mechanism and the paver lunged forward. Ms. Alfred was pinned against a tree. She sustained serious injuries to her left leg and it was ultimately amputated below the knee.

Plaintiff alleges that the subject paver is defective and unreasonably dangerous with respect to its controls. Essentially, it is argued that the controls are counter-intuitive and that they invite inadvertent inputs and results. It is alleged that the improper operation of the paver was caused by a defective control.

The Defendant's argue that the subject asphalt paver is not defective or unreasonably dangerous. They state it was manufactured in accordance with the state of the art and in compliance with industry standards. They claim the sole cause of the Plaintiff's injuries were operator negligence, negligence of the on-site supervisor, and the Plaintiff herself. Regardless of the amount of blame that may be placed on the operator of the paver the true issue of causation is whether or not the paver had a defective control mechanism. Plaintiff's case is that in fact the paver had a defective designed and incorporated dial control mechanism as opposed to a lever control recommended by the Society of Automotive Engineers (SAE) and Plaintiff's mechanical engineer expert. Causation in this case can and should be linked to the defective control. Contributory negligence on the part of the operator, no matter how much may be assigned by a jury, cannot insulate this Defendant from liability. Causation still turns to the control mechanism and the sole focus should remain on the control.

But for the defectively designed control mechanism, the operator of the paver may have gone backwards instead of lunging forward. Defendant placed a defectively designed control, incorporated into their paver, into the stream of commerce and under strict products liability they should now pay for it.

SUMMARY OF THE ARGUMENT

Plaintiff presented a mechanical engineer as her expert witness. The expert took the stand and stated that in his opinion he believed the control mechanism on the Defendant's road paving machine was defectively designed. He relied on the specifications of the Society of Automotive Engineers (SAE) relative to design of controls for certain products. He also gave opinions based on his investigative work in this case and what types of control mechanism were on other road paving machines manufactured by other companies. Plaintiff argues that her expert does not fall within the rubric of *Daubert* or *Kumho* since his opinions were not based on "novel science," nor was it "technical and unreliable." Plaintiff's expert rendered opinions that were helpful to the jury and within his ability as a mechanical engineer.

Plaintiff argues that although the *Daubert* Court did not lay out an exclusive list of factors that must be considered by a court when qualifying an expert, the Supreme Court did give great guidance in four (4) factors that may bear on the judge's "gatekeeping" determination. Plaintiff respectfully argues that her expert passes all four factors and therefore should be qualified to give his opinions in this case. His testimony focuses on how a reasonable and feasible alternative to the design chosen by the Defendant was available and was

not cost prohibitive. Therefore, Plaintiff submits that striking Plaintiff's expert witness' testimony and subsequently entering judgment in favor of the Defendant was erroneous and precluded Plaintiff's case from being tried to a jury of her peers.

ARGUMENTS AND AUTHORITIES

ABUSE OF DISCRETION STANDARD OF REVIEW

A. Plaintiff's expert witness' testimony passes the Courts "gatekeeping" inquiry

The Defendant's oral motion to strike and for verdict should have failed because the Defendant failed to sufficiently call into question the factual basis of principles or methods relied upon by Plaintiff's expert as required by applicable case law. In order to do so they would have to effectively undermine the practice of consulting standards promulgated by the Society of Automotive Engineers.

The United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), addressed the issue of what threshold standard expert testimony must pass before being admissible into evidence. The *Daubert* Court overturned the old standard of "general acceptance" and replaced it with the current threshold standard of "relevance and reliability." *Id.* at 2799. The *Daubert* Court stated that they were not embarking on any new standard but were rather just interpreting the Federal Rules of Evidence, Rule 702, as it applies to expert testimony. *Id.* at 2793, 2794. The *Daubert* Court stated that the *Frye* test, which was the "general acceptance" standard,

was superseded by the adoption of the Federal Rules of Evidence. *Id.* In further analysis by the Court, Rule 702 which says:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Nothing in the text of this rule establishes "general acceptance" as a prerequisite to admissibility, and thus that standard should not be applied in Federal Trials. *Id.*

The subject of an expert's testimony must be "scientific...knowledge." The adjective "scientific" implies a grounding in the methods and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. The term "applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds." *Id.* at 2795 (Quoting Webster's Third New International Dictionary 1252 (1986)). Of course, it would be unreasonable to conclude that the subject of scientific testimony must be "known" to a certainty; arguably, there are no certainties in science. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability. An additional consideration, under Rule 702, and another aspect of relevancy, is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the

jury in resolving a factual dispute. *Id.* at 2796. Therefore, faced with a proffer of expert testimony, then, the trial judge must determine at the outset, pursuant to Federal Rules of Evidence Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue. Plaintiff argues that her expert witness took the stand, and during his testimony stated he had nine (9) years of investigative experience, including designing of controls for a major manufacturer, and concurred with the relevant SAE standards set forth in its publication or handbook, which is essential to mechanical engineers, and thus gave a scientific opinion grounded in formulated principles found in the SAE handbook or publication and how it applied to the facts of this case. (*See* Trial Transcript Vol. I pg. 68-70 lines 25-10 (Appendix p.2); speaking as to the amount of investigation Plaintiff's expert has conducted in dealing with control mechanisms and his concurrence with standards set forth in the SAE handbook). Additionally, Plaintiff's expert considered the National Safety Council's Accident Prevention Manual and determined that human equation does play an important role in designing safety into machines and equipment. *See* Appendix p.4 (p.2 of manual). That provision goes on to state that equipment should be designed in terms of human limitations and capabilities, both mental and physical. Nothing in Plaintiff's expert witness' testimony was made ad hoc while on the stand but was rather a hypotheses developed after reading and concurring with specifications of the Society of Automotive Engineers (SAE) relative to design of controls for certain products. Any expert

witness would be hard pressed and quite honestly would find it near impossible, to find a more reliable source for conducting investigative research, than that found within the pages of the SAE handbook or publication.

B. Plaintiff presented a prima facia case based on expert testimony which should have gone to the jury instead of having judgment entered for the Defendant

The *Daubert* Court gave a set of factors that ***may*** bear on a judge's "gatekeeping" determination when dealing with the admissibility of an engineering expert's testimony. These factors include:

> (1) Whether a "theory or technique...can be (and has been) tested";
> (2) Whether it "has been subjected to peer review and publication";
> (3) Whether, in respect to a particular technique, there is a high "known or potential rate of error and whether there are standards controlling the techniques operation";
> (4) Whether the theory or technique enjoys "general acceptance" within a "relevant scientific community."

Id. at 2796, 2797. Plaintiff argues that her expert witness passes each of these considerations. First, Plaintiff's expert has nine (9) years of specific and documented experience evaluating controls for their safety. The accepted theory and technique Plaintiff's expert followed have been unequivocally tested over the past nine (9) years and he did not fall short in his attempt in this case. Plaintiff's expert specifically testified

that the SAE handbook specifically provides for a different type of control mechanism to be on the road-paving machine in question in this case. Plaintiff's expert confirmed facts in evidence from the SAE manual (Appendix p.3) which lay a foundational basis for support of the Plaintiff's expert opinions relative to the said SAE standard(s). Plaintiff argues that her expert did nothing remarkably different than the Defendant's three (3) expert(s). He looked at the pictures from the Caterpillar road-paving machine and portions of the Navy's investigation report, then pulled selected sections from his SAE handbook, Plaintiff's exhibit number four (4), (Appendix p.3), and as admitted into evidence, and determined by visual inspection that in fact the SAE standard, which mechanical engineers rely upon in rendering expert opinions, specified a different type of control mechanism to be on this Caterpillar machine. Plaintiff submits that the visual inspection along with review of testimony and reports, that included matters relative to function of the control, research relative to industry knowledge in the form of standards and verifying of findings through field research of construction equipment was completed in determining that the control mechanism in question should have been designed differently. The burden then rested upon the Defendant to rebut the specifications given by the SAE standard and the opinion of Plaintiff's expert.

Second, the SAE handbook is published and subject to peer review in the scientific community and specifically the mechanical engineering community, and has been for the last twenty-seven (27) years. If anything in the SAE handbook ceases to be scientifically accepted then being subject to peer review it will logically change. However, in this case Plaintiff's expert relied, as would other mechanical engineers,

on the scientifically accepted standards set forth in the SAE handbook to support his opinion(s) during his testimony.

Third, as stated above, the standards controlling the technique used and relied upon by Plaintiff's expert are derived from use of various scientific principles; industry standards, including but not limited to, standards found in the SAE handbook or publication. Plaintiff's expert was giving scientifically derived expert testimony to the jury from a technique generally accepted which arguably incorporates different fields of scientific study, including but not limited to mechanical engineering with considerations related to the overlapping field of human factors. Human factors becomes a factor in a mechanical engineers hypotheses after looking to the National Highway Council's Accident Prevention Manual (Appendix p.4) which talks about human instincts should be considered when designing industrial equipment. The technique in question utilized primarily a visual inspection process. Obviously, Plaintiff's expert, with his well documented and impressive credentials, has enough experience as would most lay persons to visually look at a picture of the Caterpillar road paving machine in question and by relying upon the SAE standards, set forth in J297 (in effect for the past 27 years), determine that the control mechanism, which Plaintiff argues had a design defect, was designed and incorporated into the Caterpillar machine in a way that was directly converse to the SAE standards set forth in the SAE handbook and the Accident Prevention Manual. (*See* Trial Transcript Vol. I pg. 71 lines 7-12 (Appendix p.2,3,4); also *See* Trial Transcript Vol. I pg. 73 lines 5-14, where Plaintiff's expert states the dial control mechanism used to accelerate the Caterpillar machine is in direct violation of the SAE standard on this piece of equipment).

Fourth, by adopting statements made above, Plaintiff argues that the method relied upon by her expert is the method generally accepted by the "relevant scientific community." Plaintiff's expert went out to a local dealer of large equipment to investigate, since the actual Caterpillar machine in question was in Rota, Spain and unavailable to both parties, and stated in this Court based on his observations that "[I] looked at bulldozers and pavers and rollers and all kinds of equipment...and every one of them had either a foot pedal or a lever." (*See* Trial Transcript Vol. I pg. 75 lines 2-4 and 12-15; (Appendix p.2)). Plaintiff argues that her expert did what is required of a competent mechanical engineer and as a person qualified to give expert testimony on the liability issues in this case. He looked to the Society of Automotive Engineers (SAE) handbook and their specifications on what type of accelerating control mechanism should be used in the large equipment industry, reviewed relevant evidence, reviewed applicable information relative to industry knowledge, and went to a local dealer in large equipment, and then observed that each piece of equipment had either a foot pedal or a lever as an accelerating or rearing control mechanism in compliance with the SAE standard that had been in effect for the past twenty seven (27) years. Plaintiff's expert was put on the stand to offer testimony as to the fact that the Defendant's machine and specifically its control mechanism was directly converse to the SAE standards and converse to all other large pieces of equipment he observed within the industry during his investigation. Thereby, he gave an opinion that the control mechanism on the Caterpillar machine in question was defective by design and unreasonably dangerous. The SAE standards prove Plaintiff's product liability theory by proving that this Defendant knew or should have known that they were

producing a product that had a design defect; not only a design defect as incorporated within the SAE standards but also a design defect as compared to the rest of the industry producing large equipment such as the road-paving machine in question. Ironically, the very standards set out in the SAE handbook, in which Plaintiff's expert witness relied, were adopted by certain people from Caterpillar that helped promulgate and adopt the standards Plaintiff is arguing were violated. (*See* Trial Transcript Vol. I pg. 84 lines 2-18; *See* also Plaintiff's exhibit number four (4): Appendix p.5 to this motion, which lists numerous Caterpillar employees on the SAE board that promulgated this standard).

The Supreme Court revisited their decision in the *Daubert* case when they decided the *Kuhmo Tire Company* case. Within the *Kuhmo* opinion the Supreme Court stated that the list of factors stated above was meant to be helpful, not definitive. *Kuhmo Tire Company v. Carmichael*, 119 S. Ct. 1167, 1175 (1999). In certain cases, the Court stated it will be appropriate for the trial judge to ask, for example, how often an engineering expert's experience-based methodology has produced erroneous results, or whether such a method is generally accepted in the relevant engineering community. *Id.* at 1176. Plaintiff argues that if this Court had such a concern, then voir dire of Plaintiff's expert would have been proper. If this Court would have asked her expert witness about his previous results this Court may have had a change of mind in striking Mr. Munsell's testimony and in directing a verdict for the Defendant's. The objective of the "gatekeeping" requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level

of intellectual rigor that characterizes the practice of an expert in the relevant field. *Id.* Plaintiff's expert employed the same method generally accepted by mechanical engineers: inspect, visualize, review relevant evidence, review relevant standards, process, hypothesize and reach an opinion. Plaintiff's expert required nothing more or nothing less and he did nothing but give an opinion grounded in accepted scientific principles as stated and provided for from sound mechanical engineering disciplines that also recognize and incorporate, as any other scientific discipline will, the discipline addressing human factor issues, as are incorporated in the SAE handbook/standards, admitted into evidence in this case. The expert opinion of Plaintiff's expert is based solidly upon the SAE J297 standard, which is not a human factors treatise but a general engineering treatise commonly accessed and relied upon by mechanical engineers across the country. However, Plaintiff wishes to establish that Plaintiff's expert witness did not address human factor issues on direct examination. It was not until cross-examination of Plaintiff's expert that human factors became an issue. There is no distinct line that can be drawn between mechanical engineering and human factors; they cross over into each respective field. Defendant's entire defense was based around operator error. The only testimony given by Plaintiff's expert regarding the issue of operator error was that if there was operator error it was caused by design defect in the control mechanism on the Caterpillar machine. (*See* Trial Transcript Vol. I pg. 133-134 lines 24-6 (Appendix p.2)). Therefore, human factors, specifically operator negligence, did become part of Plaintiff's expert testimony but not until Defendant got into that area of overlap between mechanical engineering and human factors. Nevertheless, the fact remains even if there was operator negligence, Plaintiff's

expert specifically stated damages resulting to Plaintiff in this case was caused not by operator negligence but by design defect in the control mechanism on the Caterpillar machine. Plaintiff argues that a question of fact is at issue and therefore a jury of her peers should decide that fact.

1. Feasible Alternative

A product may be proven to have a design defective in one or more way. First, the product is defectively designed if there is a feasible alternative to design. The risk of harm created by the current design does not outweigh the benefits of the design if there is a safer design that does not unduly restrict efficiency nor unduly increase costs. Second, the product can be defectively designed if the product violates consumer expectations of safety even if there is no proof of a safer, equally efficacious design. The presence of a feasible alternative practicable under the circumstances proves that the utility of design does not outweigh the risk of harm. Therefore, Plaintiff submits that there existed a feasible alternative design to the Defendant's road paving machine's control mechanism. For that opinion Plaintiff offered the testimony of Mr. Bill Munsell to establish that in fact after his research he determined there did exist a practicable, cost efficient alternative to the design used by the Defendant. All the scientific standards found in the SAE manual called for a lever to be used for ground speed and direction control and not a dial mechanism. *See* Appendix p.3. Specifically, SAE J297, in the Foreword to that section, states the SAE standard is intended to improve operator efficiency and convenience by providing guidelines for the uniformity of location and direction of motion of operator controls used on industrial wheeled equipment. Industrial wheeled equipment is defined

as equipment used in operations such as landscaping, construction services, loading, digging, grounds keeping, and highway maintenance. SAE J297(2.2.1). SAE J297 §6.2, "Ground Speed and Direction Control," recommends:

> "[w]hen a hand-operated forward-reverse directional control lever (non-variable speed) is provided, it shall be moved forward for forward machine motion and be moved generally rearward for reward machine motion."

Then §6.2 states: "[w]hen a hand-operated variable speed control is provided, it shall be moved generally forward and/or upward to increase speed."

The Defendant's road paving machine has a dial control mechanism, which controls the ground speed of the machine. As stated above the SAE manual and/or publication calls for a lever to be used in a forward or rearward motion and not a clockwise and/or counterclockwise dial to maintain the ground speed and direction control.

Therefore, the SAE manual does provide a feasible alternative to the design of the control mechanism that was incorporated into the Defendant's road paving machine. And since Plaintiff showed an alternative design she thereby established a defect in the design of the dial control mechanism on the Defendant's machine.

CONCLUSION

WHEREFORE, Plaintiff respectfully requests this Court to find that the lower court committed reversible error by misapplying the *Daubert* and *Kumho* rules to the facts in this case and that the Plaintiff should receive a new trial.

ORAL ARGUMENTS RESPECTFULLY REQUESTED

Plaintiff feels that the issue raised in this appeal warrants oral arguments to clarify the *Daubert* and *Kumho* rules. Plaintiff feels that this case could cause other circuits to reconsider how they apply both rules in the context of scientific testimony. Plaintiff feels that misapplication of the *Daubert* and *Kumho* rules has prejudiced her and other unknowing Plaintiffs may be prejudiced as well. Seeing this case as an opportunity for clarity in this area of the law, Plaintiff respectfully feels that oral arguments are warranted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Thomas J. Steece, hereby certify that I have complied with the word and page limitation in accordance with the Federal Rules of Appellate Procedure. I further certify that I have mailed the foregoing brief to the Clerk for the Tenth Circuit Court of Appeals and both counsel of record this _____ day of November, 2000.

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APPENDIX

United States District Court for the Western District of Oklahoma Docket Entries 1

Portion of Trial Transcript 2

1999 SAE Handbook "Operator Controls on Industrial Equipment" 3

Accident Prevention Manual 4

1974 SAE Handbook showing Defendants helped promulgate standards in the SAE 5

Judgment Order from the District Court 6

Trial Transcript of Judge Cauthron's decision granting Defendant's motion 7

Order denying Plaintiff's motion for a new trial 8

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA
(Oklahoma Cty)

CIVIL DOCKET FOR CASE #: 99-CV-14

Alfred v. Caterpillar Inc

Filed: 01/06/99

Assigned to: Honorable Robin J. Cauthron
Jury demand: Plaintiff
Demand: $75,000
Nature of Suit: 365
Lead Docket: None
Jurisdiction: Diversity
Dkt# in other court: None
Cause: 28:1332 Diversity-Product Liability

CHRISTI ALFRED, individually plaintiff	Thomas J Steece 405-942-2661 [COR LD NTC] Mark A Mathews 405-942-2661 [COR LD NTC] Steven R Jung 405-942-2661 [COR LD NTC] Steece & Mathews PC P O Box 12992 Oklahoma City, OK 73157-2992 405-943-8300

v.

CATERPILLAR INC, a foreign corporation dba CAT aka CAT defendant	William T Womble 713-650-1932 [COR LD NTC] Womble & Cotellesse 1814 Memorial Dr Houston, TX 77007 713-650-6000 James A Jennings, III 405-609-6501 [COR LD NTC] Carrie L Hoisington 405-609-6501 [COR LD NTC] Jennings Cook & Hoisington 204 N Robinson Ave Suite 1900 Oklahoma City, OK 73102 405-609-6000

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
1/6/99	1	COMPLAINT (kb) [Entry date 01/07/99]
1/6/99	2	PRAECIPE for and issued 1 summs by plaintiff Christi Alfred (kb)[Entry date [01/07/99]
1/6/99	--	RECEIPT For Money Received from plaintiff Christi Alfred in the amount of $150.00, receipt # 067572 (kb)[Entry date 01/07/99]

1/19/99	3	ATTORNEY APPEARANCE for defendant Caterpillar Inc by James A Jennings III (kb)[Entry date 01/19/99]
1/19/99	4	ATTORNEY APPEARANCE for defendant Caterpillar Inc by Carrie L Hoisington (kb)[Entry date 01/19/99]
1/20/99	5	RETURN OF SERVICE executed upon defendant Caterpillar Inc on 1/8/99 by cert mail, Sig. R. ? (20 days) (kb)[Entry date 01/20/99]
1/20/99	6	ATTORNEY APPEARANCE for plaintiff Christi Alfred by Mark A Mathews (kb)[Entry date 01/20/99]
1/20/99	7	MOTION by defendant Caterpillar Inc to extend time to answer (kb) [Entry date 01/20/99]
1/21/99	8	ORDER by Honorable Robin J. Cauthron granting dft Caterpillar's motion to extend time to answer until 2/17/99 [7-1] (cc: all counsel) (kb) [Entry date 01/21/99]
2/4/99	9	MOTION by defendant Caterpillar Inc for attorney WT Womble to appear pro hac vice. Receipt for money received fromWomble & Spain in the amount of $ 25.00 receipt #068112 (kb)[Entry date 02/04/99]
2/5/99	10	ORDER by Honorable Robin J. Cauthron granting motion for attorney WT Womble to appear pro hac vice. Receipt for money received from Womble & Spain in the amount of $

		25.00 receipt # 068112 [9-1] (cc: all counsel) (kb)[Entry date 02/05/99]
2/17/99	11	ANSWER by defendant Caterpillar Inc (kb)[Entry date 02/17/99]
3/16/99	--	DOCKET STATUS/SCHED CONF ; status scheduling conf set for 10:00 4/1/99 (kb) [Entry date 03/17/99]
3/25/99	12	ATTORNEY APPEARANCE for defendant Caterpillar Inc by William T Womble (kb) [Entry date 03/26/99]
3/30/99	13	JOINT STATUS REPORT by plaintiff Christi Alfred, defendant Caterpillar Inc (kb) [Entry date 03/31/99]
4/1/99	14	SCHEDULING ORDER Honorable Robin J. Cauthron ; jury trial set for 1/1/00 ; Discovery set for 11/1/99 ;mtn filing ddl set for 11/1/99 ; pretrial order due 1/1/00 ; status scheduling conference held on 10:00 4/1/99 mtns to join due: 8/1/99 mtns to amend due: 8/1/99 pla's wit lst due: 10/15/99 pla's exh lst due: 10/15/99 dft's wit lst due: 10 days t/a dft's exh lst due: 10 days t/a mtns in limine due: 1/1/00 jury instr due: 1/1/00 voir dire requests due: 1/1/00 trial briefs due : 1/1/00; Cs is referred to mediation by agreement of the ptys w/the session to be held between 8/1/99 & 10/1/99; Voluntary disclosure has been made (cc: all counsel) (kb) [Entry date 04/02/99]

8/1/99	45	TRIAL briefs submitted by defendant Caterpillar Inc (fp)[Entry date 08/02/00]
9/1/99	15	EXPERT WITNESS list submitted by plaintiff Christi Alfred (kb) [Entry date 09/02/99]
9/7/99	16	MOTION by defendant Caterpillar Inc, plaintiff Christi Alfred to extend all ddls (kb) [Entry date 09/08/99]
9/10/99	17	ORDER by Honorable Robin J. Cauthron denying motion to extend all ddls [16-1]; Ct finds that the appl contains insufficient information; It is ord that ptys submit a joint stmt of efforts made to locate the machine to date; Rpt to be filed by 9/15/99; otherwise the mtn is denied (cc: all counsel) [EOD Date 9/10/99] (kb) [Entry date 09/10/99]
9/15/99	18	RESPONSE by defendant Caterpillar Inc, plaintiff Christi Alfred to ct's req regarding ptys joint appl for ext of ddls (kb) [Entry date 09/16/99]
9/17/99	19	ORDER by Honorable Robin J. Cauthron granting motion to extend all ddls [16-1] ; All ddls entered in the sched ord of 4/1/99 are ext by 120 days Discovery set for 3/1/00 ; Motion Filing ddl ext 120 days ; Pretrial order ddl ext 120 days; (cc: all counsel) [EOD Date 9/17/99] (kb) [Entry date 09/17/99]

12/27/99	20	MOTION by plaintiff Christi Alfred to extend time to submit expert rpts (kb) [Entry date 12/28/99]
12/28/99	21	ORDER by Honorable Robin J. Cauthron granting motion to extend time to submit expert rpts [20-1] Plf is given untilk 2/14/00 to submit expret wit rpt & dft is given until 3/14/00 to submit its expert wit rpt (cc: all counsel) [EOD Date 12/28/99] (kb) [Entry date 12/28/99]
2/16/00	22	MOTION by plaintiff Christi Alfred to strike sched order & set a new status & sched conf (kb) [Entry date 02/16/00]
2/17/00	23	ORDER by Honorable Robin J. Cauthron denying motion to strike sched order & set a new status & sched conf [22-1] Plf has not shown good cause for striking the current sched ord; Cnsl shall file a joint disc rpt, setting out what disc remains to e concluded & a sched for completing it, before any cont will be considered (cc: all counsel) [EOD Date 2/17/00] (kb) [Entry date 02/17/00]
2/23/00	24	LETTER RE WITNESS list submitted by defendant Caterpillar Inc (kb) [Entry date 02/24/00]
2/23/00	24	LETTER RE EXHIBIT list by defendant Caterpillar Inc (kb) [Entry date 02/24/00]
2/29/00	25	JOINT DISCOVERY RPT NOTICE by defendant Caterpillar Inc, plaintiff

		Christi Alfred (kb) [Entry date 03/01/00]
3/24/00	--	DOCKET TRIAL; jury trial set for 9:00 5/8/00 (bm) [Entry date 03/24/00]
4/3/00	26	ORDER by Honorable Robin J. Cauthron ; Settlement conf set for 9:30 a.m. on 4/24/00 before Magistrate Judge Bacharach (cc: all counsel) [EOD Date 4/3/00] (bm) [Entry date 04/03/00]
4/3/00	27	ORDER by Honorable Robin J. Cauthron granting motion to strike sched order & set a new status & sched conf [22-1] Discovery ddl ext to 6/20/00 ; Motion Filing ddl ext to 6/30/00 ; Mediation completion ddl ext to 7/15/00 ; Plf's & Dft's wit & exh list ddls ext to 5/20/00 ; Mtns in limine, req voir dire, trial brfs, req jury instructions and Pretrial report ddls ext to 8/1/00 ; Jury trial ext to 8/14/00 (cc: all counsel) [EOD Date 4/3/00] (bm) [Entry date 04/03/00]
4/12/00	28	ENTER ORDER by Magistrate Judge Bob Bacharach Settlement conf is stricken, at the request of and by agreement of the parties (cc: all counsel) [EOD Date 4/13/00] (bm) [Entry date 04/13/00]
4/28/00	29	NOTICE by defendant Caterpillar Inc of taking deposition of William P. Munsell (bm) [Entry date 05/01/00]

5/22/00	30	TRIAL EXHIBIT list by defendant Caterpillar Inc (bm)[Entry date 05/23/00]
5/22/00	31	WITNESS list submitted by defendant Caterpillar Inc (bm) [Entry date 05/24/00]
5/26/00	32	EXHIBIT list by plaintiff Christi Alfred (bm) [Entry date 05/30/00]
5/26/00	33	WITNESS list submitted by plaintiff Christi Alfred (bm) [Entry date 05/30/00]
5/31/00	34	MOTION by plaintiff Christi Alfred for leave to file Plf's witness & exhibit list out of time (bm) [Entry date 06/01/00]
6/1/00	35	ORDER by Honorable Robin J. Cauthron granting Plf's motion for leave to file Plf's witness & exhibit list out of time[34-1] (cc: all counsel) [EOD Date 6/1/00] (bm)[Entry date 06/01/00]
6/14/00	37	NOTICE by plaintiff Christi Alfred of taking deposition of Ron Wilson (bm) [Entry date 06/15/00]
6/14/00	38	NOTICE by plaintiff Christi Alfred of taking deposition of Dr. Richard F. Krenek (bm) [Entry date 06/15/00]
6/15/00	36	JOINT APPLICATION by defendant Caterpillar Inc, plaintiff Christi Alfred for order to take depositions out of time (bm)[Entry date 06/15/00]

6/16/00	39	ORDER by Honorable Robin J. Cauthron granting the joint application for order to take depositions out of time [36-1] (cc: all counsel) [EOD Date 6/16/00] (bm) [Entry date 06/16/00]
6/21/00	--	DOCKET-TRIAL ; jury trial set for 8/14/00 (bm) [Entry date 06/21/00]
6/23/00	40	ORDER by Honorable Robin J. Cauthron ; Settlement conf set for 1:30 p.m. on 7/19/00 before Magistrate Judge Bacharach (cc: all counsel) [EOD Date 6/23/00] (bm) [Entry date 06/23/00]
7/19/00	41	ENTER ORDER by Magistrate Judge Bob Bacharach ; Settlement conf was held as scheduled (cc: all counsel) [EOD Date 7/20/00] (bm) [Entry date 07/20/00]
7/20/00	--	**Renoticed document (bm) [Entry date 07/20/00]
7/25/00	42	MOTION by plaintiff for order to conduct the deposition of Dft's expert out of time (bm) [Entry date 07/26/00]
7/27/00	43	ORDER by Honorable Robin J. Cauthron granting Plf's motion for order to conduct the deposition of Dft's expert out of time [42-1] (cc: all counsel) [EOD Date 7/27/00] (bm) entry date 07/27/00]
8/1/00	44	Proposed VOIR DIRE submitted by defendant Caterpillar Inc (fp) [Entry date 08/02/00]

8/1/00	46	REQUESTED JURY INSTRUCTIONS submitted by defendant Caterpillar Inc (fp) [Entry date 08/02/00]
8/1/00	47	MOTION AND BRIEF AND/OR AUTHORITIES IN SUPPORT by plaintiff Christi Alfred in limine as more fully set out in mtn 1-12 as to events (fp) [Entry date 08/02/00]
8/1/00	48	TRIAL briefs submitted by plaintiff Christi Alfred (fp) [Entry date 08/02/00]
8/2/00	49	Proposed VOIR DIRE submitted by plaintiff Christi Alfred (ap) [Entry date 08/03/00]
8/2/00	50	REQUESTED JURY INSTRUCTIONS submitted by defendant Caterpillar Inc (ap) [Entry date 08/03/00]
8/3/00	51	MOTION by defendant Caterpillar Inc, plaintiff Christi Alfred to extend time for filing Pret Trial Order to August 8, 2000 (ap) [Entry date 08/04/00]
8/4/00	52	ORDER by Honorable Robin J. Cauthron granting joint motion to extend time for filing Pret Trial Order to August 8, 2000 [51-1] ; Pretrial report ddl 8/8/00 (cc: all counsel) [EOD Date 8/4/00] (ap) [Entry date 08/04/00]
8/4/00	53	STATEMENT to Ct re Cert of Mailing by plaintiff Christi Alfred of plf's proposed jury instrucs, voir dire, and

		mtn in limine to dft's cnsl (ap) [Entry date 08/04/00]
8/8/00	54	ATTORNEY APPEARANCE for plaintiff Christi Alfred by Thomas J Steece (bm) [Entry date 08/09/00]
8/9/00	55	PRAECIPE for and issued 1 subpoena (bm) [Entry date 08/10/00]
8/11/00	56	PRAECIPE for and issued 1 subpoena by plaintiff Christi Alfred (bm) [Entry date 08/14/00]
8/11/00	57	FINAL PRE-TRIAL REPORT (bm) [Entry date 08/14/00]
8/11/00	58	BENCH BRIEF FILED by defendant Caterpillar Inc: Manufacturer's Product Liability (bm) [Entry date 08/14/00]
8/14/00	59	ORDER by Honorable Robin J. Cauthron granting final pre-trial report [57-1] (cc: all counsel) [EOD Date 8/14/00] (bm) [Entry date 08/14/00]
8/14/00	60	COURTROOM MINUTES: Jury Trial, Jury duly empaneled and admonished. Plf & Dft make opening stmt. Plf presents case in chief w/testimony of witnesses. Plf rests. Dft's Mtn for Rule 50 JMOL is Granted. Dft's Mtn to Strike Plf's expert - granted (bm) [Entry date 08/15/00]
8/15/00	61	JUDGMENT: by HonorableRobin J. Cauthron that this action came to trial or hearing before a jury. Following

		the close of Plf's evidence a decision has been rendered by the Ct that judgment be, and hereby is, awarded to defendant (cc: all counsel) (bm) [Entry date 08/15/00]
8/23/00	--	TRANSCRIPT of Jury Trial held on Monday, August 14, 2000 by CSR Greg Bloxom (sn) [Entry date 08/24/00]
8/25/00	62	ATTORNEY APPEARANCE for plaintiff Christi Alfred by Steven R Jung (bm) [Entry date 08/28/00]
8/25/00	63	MOTION by plaintiff Christi Alfred to reconsider judgment entered for the Dft w/combined Motion for a New Trial with corresponding brief in support (bm) [Entry date 08/28/00]
8/29/00	64	ORDER by Honorable Robin J. Cauthron denying Plf's motion to reconsider judgment entered for the Dft w/combined Motion for a New Trial [63-1] (cc: all counsel) [EOD Date 8/29/00] (bm) [Entry date 08/29/00]
8/29/00	--	BILL OF COSTS submitted by defendant Caterpillar Inc re judgment [61-2] (Hrg set for 9:00 a.m. on 9/21/00) (bm) [Entry date 08/31/00]
8/29/00	65	APPLICATION by defendant Caterpillar Inc for costs (bm) [Entry date 08/31/00]

8/29/00	66	BRIEF FILED by defendant Caterpillar Inc regarding motion for costs [65-1] (bm) [Entry date 08/31/00]
9/11/00	69	NOTICE OF APPEAL by plaintiff Christi Alfred from Dist. Court decision transcript order set for 9/28/00, [61-2] (sn) [Entry date 09/18/00]
9/11/00	--	RECEIVED re appeal [69-1] fee in amount of $ 105.00 (Receipt # 79214) (sn) [Entry date 09/18/00]
9/15/00	67	OBJECTIONS by plaintiff Christi Alfred to Dft's motion for costs [65-1] (bm) [Entry date 09/18/00]
9/15/00	68	MOTION by plaintiff Christi Alfred for order to hold in abeyance Dft's Mtn to Tax Costs (bm) [Entry date 09/18/00]
9/18/00	70	CLERK'S LETTER re: service of Notice of Appeal, with copy of letter, Notice of Appeal and docket sheet as preliminary record mailed to CCA and counsel (sn) [Entry date 09/18/00]
9/20/00	71	ENTER ORDER by Honorable Robin J. Cauthron denying Plf's motion for order to hold in abeyance Dft's Mtn to Tax Costs [68-1] all counsel) [EOD Date 9/20/00] (bm) [Entry date 09/20/00]
9/21/00	72	COSTS taxed for defendant Caterpillar Inc in the amount of $8,497.47 against plaintiff Christi Alfred (cc: all counsel) (bm) [Entry date 09/21/00]

9/22/00	73	CLERK'S letter to CCA and counsel advising all transcripts have been received, therefore, the record is ready for appeal purposes. (sn) [Entry date 09/22/00]
9/27/00	74	NOTICE of Transcript Order Form by plaintiff Christi Alfred that transcripts are necessary; Dates Ordered : Trial, 8-17-00 transcript order satisfied9/27/00 (sn) [Entry date 10/11/00]
10/10/00	75	APPELLATE Docket Number 00-6317 (sn) [Entry date 10/10/00] [Edit date 10/11/00]

WILLIAM PAUL MUNSELL -
DIRECT (By Mr. Steece)

* * *

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belong to.

A. Well, I pay dues as a registered professional engineer to the Oklahoma Society of Professional Engineers, I guess. In the past, I've belonged to different organizations: SAE, ASME, that kind of thing.

Q. And do those organizations, do they publish literature and information relative to the type of work that you do?

A. Sure. Throughout the nine years that I've been doing this, and before in college too, a big part of the job is researching standards covering different types of equipment. Mostly they're focused and oriented on the safety of that equipment.

Q. When you talk about standards, can you explain to the jury a little bit more of what you mean by standards?

A. Well, different organizations will issue the standards. Usually, people knowledgeable in the field will get together, maybe some government representation, a lot of representation for the different companies that make whatever it is the standard is about, and they'll get together and they will write a method of doing things or description of the equipment that they think is a minimum for a safe design.
Sometimes it's not necessarily safety; it's some kind of functionability. But, largely, the important parts of the standards deal with safety.
The Society of Automotive Engineers is a big one. They

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issue a lot of standards of vehicles of all types. ANSI, American National Standards Institute, issues a lot of others.

Q. When you say "standards on vehicles," are you talking about vehicles we drive on the road as well as off-road vehicles?

A. Yes.

Q. As a mechanical engineer, have you ever had the occasion to analyze and look at control mechanisms, control systems for different products?

A. Yes.

Q. And what would be the purpose for such an event to occur?

A. Well, when I go to look at something, something's gone wrong, so there's an accident involved, normally. So, it depends on what's happened as to what role the controls might be - - might present themselves in the course of my investigation.
If you've got a guarding system on a punch press or something like that that's an issue, you look at how the punch press is designed. The answer might be a barrier to keep you from getting to the point of danger, or it could be with the controls. You could need to employ a tow-hand control system and put it far away enough from the point of operation that you can't get hurt.
Other situations. I worked on a lawn mower case one time, a lawn mower that you rode. It had a lever for putting you in

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a certain gear, forward and reverse, and it went back and forth, and it had a couple of problems. There was a mechanical issue with a work cam inside of it that made it slip between gears very easily. But the other thing was the user could get fooled about what gear he was in because there was a certain slop in the gear. Also, from his angle of view, the numbers showing you which gear you were in were up here and the lever is down here. It depended on where you looked from, what angle, you know, what gear you thought you were in.
That's a good example.

Q. And in your analysis of various control systems, have you found that those control systems are critical to the proper operation of the product?

A. Some of them are.

Q. Now, sir, in this particular case, involving this Caterpillar 800 B series paver, what was your assignment that you were given in regard to this particular case?

A. Well, to evaluate all the facts of the accident that I could get my hands on, and to identify what the contributing factors to the accident were.

Q. And in this particular case, you had the opportunity to review the Navy investigation report; is that correct?

A. That's right. I reviewed all the testimony from all the witnesses in the Navy report. I reviewed the conclusions of the people who wrote the Navy reports. I also looked at some

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photographs that they provided of the evidence machine. I looked at, I believe, some brochures for

exemplar machines. I also went out and did surveys of other construction equipment to see what was commonly in use. I went up to Kirby-Smith and looked at excavators and bulldozers and rollers and all these kinds of things that you use to make a highway, including a paver. They had a paver there. I also reviewed the standards, a general industry standard and a standard that was specific to this piece of equipment.

Q. When you say "a standard that was specific to this piece of equipment,' do you remember what that standard was?

A. Yes. That's SAE 5297.

Q. And, sir, after reviewing the Navy investigation report and reviewing other information, did you come to an understanding of how this accident happened?

A. Yes.

Q. And what's your understanding of how the accident happened?

A. That the operator was moving forward and understood that the person that was directing him, Ms. Lindsey, wanted him to stop, so he goes to stop the machine, only there's a dial control and he moves it the wrong way and speeds up instead of stops and runs into her.

Q. And is the testimony that's contained in that Navy report or in Ms. Lindsey's deposition, is that consistent with your

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on this machine, helped him make this mistake.

Q. How did this control help Mr. Worstell make the mistake?

A. Well, it's not intuitive. The control is a dial control and it turns one way to increase whatever it is and it turns the other way to decrease. Well, the thing that was being used to control, though, was the motion of the whole vehicle. It's not intuitive which direction to turn with that dial to increase or decrease, number one. But, aside from that, it's not a good control for moving the whole vehicle. It's the accelerator. The ides is – The concept is that you want the control, if possible, to mirror the action of what it's controlling, and that's what the SAE standard demands.
This control, this dial control, violates the SAE standard on this piece of equipment. That standard says that when a hand - - a variable speed control is going to be a hand control, when that's provided, that the control needs to move upward or forward to increase speed of the vehicle, and that's consistent with the concept that the control moves in the same direction as what it controls. You move a lever forward, the vehicle speeds up and goes. If you angle one control a little bit, it will be up and forward. But that's what the standard requires. The standard does not allow for a rotary control for this function, this special function. But that's what we have.
Not only is it a critical function that it's controlling the entire vehicle, the kinetic energy or the mass of the whole

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there is very low probability that you're going to be wrong.

Q. You said that you went out to Kirby-Smith. That's a local dealership here?

A. Yes.

Q. And what was the purpose of going out there and what did you find?

A. Well, I already knew, when I looked at the naval report, that most vehicles didn't have dial controls. In fact, I didn't know of any that control the speed of the whole vehicle. So I went out to do some research specifically to look at other types of construction equipment.
As I mentioned, I looked at bulldozers and pavers and rollers and all kinds of equipment that are used by the same people that would hop on a paver, and every one of them had either a foot pedal or a lever.

Q. When you looked at these and you saw foot pedals and levers, what function did those levers and foot pedals control?

A. Well, there were a lot of different levers on different types of machines. The levers that I'm talking about control the speed of the vehicle and sometimes also the direction of the vehicle.
I also went and looked - - surveyed some other equipment that did use dials but not for vehicles. I couldn't find any.

MR. JENNINGS: Objection, Your Honor. It's outside the scope of the work he has done in this case and outside the

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A. Yes.

Q. And you said that portions of it included a listing of who was on the SAE committees that promulgated these rules?

A. That's right.

Q. And you indicated that there was certain people from Caterpillar on those committees?

A. There's several people from Caterpillar.

Q. And what is the significance of having someone on the committee relative to these SAE standards?

A. Well, from my point of view, I would expect them to know what the standards say in any case. But certainly when you're on the committee, I expect you to know the standard.

Q. When you say "when you're on the committee," you're talking about people from Caterpillar?

A. Right.

Q. And you expect them to know what the standards are relative to the control mechanisms for this 800 B machine?

A. Yes.

Q. Is it your understanding that the subject paver that Ms. Alfred was injured by was manufactured or built after the 1973 standard?

A. That's my understanding, yes.

Q. Sir, exhibit 4-B, you relied upon information in that relative to formulating some of your opinions?

A. Yes.

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is turn this dial down to a slow speed which stops it. It doesn't just get slow; it actually stops. That's the first thing you do in every one of these procedures.

Q. And in the manual, turning the dial down to zero is something you can actually stop the machine?

A. Yes.

Q. Okay. You don't have to use the brake that Mr. Jennings was using about to actually stop the machine?

A. I couldn't find any procedure where the first thing you did was to push on a brake with your foot, use the brake pedal or flip any switches to stop it. The only procedures I see include turning the speed down to nothing. First thing you do.

Q. Okay. Then, from reviewing Mr. Worstell's statements that you talked about earlier and Mr. Jennings went over some of those with you, what is your understanding of whether or not Mr. Worstell followed the proper procedures to slow this machine down to a stop?

A. Well, what he had in mind to do was perfectly fine. There was nothing wrong with it. What actually happened, of course, gave him the opposite result.

Q. And what gave the opposite result was what, sir?

A. Was that he turned this dial the wrong way when he went to do the first step in stopping the machine.

Q. And, sir, if you know Mr. Worstell turned the machine - - or the dial on this machine the wrong way to stop it, the

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machine, in your opinion, is unreasonable dangerous and defective as a result of the controls and not what Mr. Worstell did; is that correct?

A. Yes. The defect is a part of the machine. He made an error, but it's helped out and, in part, caused by this control.

MR. STEECE: Thank you. That's all I have, Your Honor.

THE COURT: Recross?

MR. JENNINGS: Very little, judge.

RECROSS-EXANINATION

BY MR. JENNINGS:

Q. Mr. Munsell, I would just like to see if you and I can agree on three things. Number one: The foot break is a way to stop this machine?

A Yes.

Q. Number two: The foot break is intuitive?

A. Yes.

Q. And, number three: At the time of this accident, the control was in forward, not reverse?

A. Yes.

MR. JENNINGS: That's all I have. Thank you.

THE COURT: You may step down.

(WITNESS EXCUSED)

THE COURT: Call your next witness.

1999 SAE HANDBOOK

VOLUME 3
On-Highway Vehicles and Off-Highway Machinery

Standards Development Program

Published by:
Society of Automotive Engineers, Inc.
400 Commonwealth Drive
Warrendale, PA 15096-0001
USA
Phone: (724) 776-4881
Fax: (724) 776-5760

6. *Ground Speed and Direction Control*

6.2 When a hand-operated forward-reverse directional control lever variable speed) is provided, it shall be moved forward for forward machine motion and be moved generally rearward for rearward machine motion. If a neutral position is provided, provisions shall be made to prevent accidental movement of control.

6.3 When a hand-operated variable speed control is provided, it shall be moved generally forward and/or upward to increase speed.

6.4 Hand-operated combination direction and variable speed ratio control on lever(s) shall be operated in one of the following patterns:

6.4.1 The lever shall be moved forward or away from the operator from the neutral position, for forward travel and increasing forward speed. It shall be moved generally rearward or toward the operator, from the neutral position, for rearward travel and increasing rearward speed. Provision shall be made for secondary motion when passing through neutral. A positive neutral position shall be provided.

ACCIDENT
PREVENTION
MANUAL
For Industrial Operations

3d EDITION

1955
NATIONAL SAFETY COUCIL
CHICAGO • U.S.A.

Engineering Considerations

If a plant, a process, or a machine has had proper engineering in its planning, design, construction, and method of operation, it will then be safe and efficient.

If an engineer, whether he be a design engineer, a methods engineer, a production engineer, or other, has processed a job and has left an avoidable hazard in it, he has not met his responsibility.

Unsafe acts, unsafe conditions

In most industrial accidents, both an unsafe condition and an unsafe act are contributing factors. For example, it more than 95,000 work accidents reported in Pennsylvania in 1952, an unsafe condition was identified in 94.5 per cent of the cases and an unsafe act in 94.9 per cent.* Again, in Iowa, also in 1952, in nearly 10,000 disabling and nondisabling work accidents, an unsafe condition was found in 92.7 cases of the cases and an unsafe act in 88.7 per cent. *

Although the above percentages emphasize that it is usually a combination of unsafe acts and unsafe conditions that cause accidents, discussion in this section will properly concentrate on the latter.

It must be remembered, however, that an unsafe condition, in addition to being a direct cause of accidents in itself, often can lead people to perform unsafe acts. Many times, an unsafe act is the result of poor machine design, inadequately planned methods, and other engineering deficiencies.

Thus, engineering for safety should have as its objectives both the elimination of hazardous conditions and the reduction of unsafe acts. Where an unsafe condition exists, engineering for safety has not delved sufficient into the problems involved in the design of the plant, process, machine, product or operations, as well as specification of job methods and materials.

The human equation

In designing safety into machines and equipment, the human equation must be given special consideration. Almost every machine requires an operator. Therefore, equipment should be designed in terms of human limitations and capabilities, both mental and physical. The mechanisms of many machines have become too complex to be understood by the average operator.

Sensory limitations. The design engineer must be aware of the limitations of the sensory organs. He must have some idea of the probable ability of the prospective operator to correlate and use the information to be supplied him from the sounds, lights, and other signal devices to be used in the operation of the equipment.

The design engineer must also remember that an operator may react slowly to sensory stimuli simply because he has normal human limitations or because he is disturbed by special problems, such as trouble at home, poor health, or poor attitude.

The engineer who designs equipment must not expect too much of the operator in regard to the physical responses necessary in operation the machine. For example, each control lever in a cluster of control levers should be designed to have a readily identified shape and location so that the operator can easily find the one he wants without looking.

Often, an operator will inadvertently actuate a wrong switch or control because he could not differentiate between it and the correct lever or control.

The same point applies to stop, start, and inch buttons on electrical controls. Each of these buttons is round and must be pushed, whether it starts the machine, inches the machine, or stops the machine.

1974
SAE
Handbook

Published by:

Society of Automotive Engineers, Inc.,
Two Pennsylvania Plaza, New York, New York 10001

1974 Handbook

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Christi Alfred,
Plaintiff

vs.

CATERPILLAR, INC., a/k/a/ and/or d/b/a/ as CAT, a/k/a and/or d/b/a CAT, a foreign corporation,
Defendant

JUDGMENT IN A CIVIL CASE
CASE NUMBER: CIV-99-14-C

_____ Jury Verdict. This action came before the Court for a trial by jury. The isue have been tried and the jury has rendered its verdict.

xxxx Decision by court. This action came to trial or hearing before a jury. Following the close of plaintiff's evidence a decision has been rendered by the court. Fed. R. Civ. P. 50(a)

IT IS ORDERED AND ADJUDGED that judgement be, and hereby is, awarded to defendant.

Date 8-15-00

Clerk Robert D. Dennis

(by) Deputy Clerk Linda Hoode

ENTERED ON JUDGMENT DOCKET ON 8-15-00
5:99CV14 #61 Page 1/1

* * *

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THE COURT: Well, I am aware of no prohibition against moving to strike testimony rather than moving in limine ahead of trial. Often it's easier once the testimony has been given and more efficient rather than having a full-blown hearing where the witness testifies ahead of trial in order to establish the credentials of his opinion. Mr. Munsell gave an opinion that was very limited and it was backed by very little work and very little expertise. I think Mr. Jennings has covered all that at the bench and it need not be repeated. The only actual investigation that he did was to find a machine that had the lever rather than the dial in order to satisfy himself that it was possible, and to identify for the benefit of the jury the guidelines and standards on which he based his conclusion. Aside from identifying those guidelines and standards, however, he has done no work that supports his conclusion that they are prohibited, that the design of this machine is defective, or that the guidelines and standard apply even to the mechanics of this machine. I could give you, I think, Mr. Steece, from now until next week to respond to the motion. It is not the law. I believe I am fairly clear what the law requires. But the facts of this particular witness's particular opinion and the analysis and investigation that went into it, that is suspect, and I believe [148] right now, after we've ali had the benefit of his testimony and it's fresh in everyone's mind, is the best time to rule on this. I find that his opinion is simply not competent under Daubert and other cases construing Daubert; that it is not supported by sufficient testing, experience, background, education, or thought to be relied upon by this jury. Without that opinion, I think it's quite clear that there is no evidence on which this case can go to the jury, and it is for those reasons and on that basis that I grant the defendant -first, the defendant's motion to strike the expert testimony and, secondly, its Rule 50 motion for judgment as a matter of law. That concludes the case. Ms. Lindsey, I'm sure you understand or I hope that you understand that it's simply a ruling of law that I'm required to make and certainly does not indicate that me or anyone else is not completely sympathetic to your injuries, and I am sorry, but I think it's required as a matter of law, and I so rule. I will inform the jury by telling them in the jury

assembly room what I have done and sending them home. Is there anything else from counsel? Mr. Steece?

MR. STEECE: Your Honor, just for the record, to note plaintiff's objection to defendant's motion for verdict under Rule 50. I don't believe we responded to that. For the record, we object to that also.

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THE COURT: Do you want -- I'm sorry. You're exactly right. I should have given you an opportunity. Do you have any argument to make?

MR. STEECE: Your Honor, I believe the evidence presented by the plaintiff in this case does support this case going forward. The plaintiff has satisfied the prima facie elements of this case to otherwise have the case submitted to the jury and believe that the case, if submitted to the jury, would result in a verdict for the plaintiff and we would so move that the case move forward and to overrule the defendant's motion.

THE COURT: Well, if I wasn't clear, my finding is that without the expert opinion of Mr. Munsell, there is no proof of a defect or a defect that makes the product unreasonably dangerous and that is the basis for the Rule 50 motion. Counsel will please take custody of the exhibits. We do not keep them. You have to keep them yourself for any appeal purposes. Is there anything else from defendant?

MR. WOMBLE: No, Your Honor.

THE COURT: We'll be adjourned.

(PROCEEDINGS CLOSED)

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. Civ-99-14C

[Filed August 29, 2000]

CHRISTI ALFRED, Individually
Plaintiff

v.

CATERPILLAR, INC.
Defendant.

ORDER

"Plaintiffs Motion to Reconsider Judgment Entered for the Defendant with Combined Motion for a New Trial" is denied as it is without legal or factual foundation. All matters asserted within the motion were fully considered by the Court at the time the ruling was entered. There is nothing in plaintiffs motion which raises new matter or which persuades the Court contrary to its initial ruling.

Accordingly, plaintiff's motion to reconsider or in the alternative for new trial is denied.

IT IS SO ORDERED this 29th of August, 2000.

/s/_____
ROBIN J. CAUTHERON
UNITED STATES DISTRICT JUDGE

APPENDIX K

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
APPEAL NUMBER: 00-6317

CHRISTI ALFRED, individually,
APPELLANT,

v.

CATERPILLAR®, INC., a/k/a
and/or d/b/a as CAT®, a/k/a and/or
d/b/a as CAT, a foreign corporation,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
OKLAHOMA
THE HONORABLE JUDGE ROBIN J. CAUTHRON

REPLY BRIEF FOR THE APPELLANT

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ATTORNEYS FOR APPELLANT

ORAL ARGUMENTS RESPECTFULLY REQUESTED

STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. The Society of Automotive Engineers (SAE) Standard J297 does apply to Defendant Caterpillar's road paving machine that was the alleged cause of this accident.

B. Showing that there is a feasible alternative, that a control can be designed a different way, is a factor that a jury may consider in deciding whether or not a design is unreasonably dangerous.

SUMMARY OF THE REPLY BRIEF

Plaintiff adopts all arguments and authorities made to this Court in Plaintiff's opening brief. The reply brief will address two contentions raised by Defendant in their answer brief. First, Plaintiff will provide argument of why the SAE standard J297 does apply to Defendant's road paving machinery and that it applied to Defendant's paver which is in question in this case. Second, Plaintiff will provide argument and authority of why proving that an alternative design existed at the time Defendant's paver was manufactured is a factor that may be considered by a jury when deciding if designs are unreasonably dangerous. Plaintiff will argue that she carried her burdened in providing an alternative design existed at the time Defendant's paver was manufactured but that Defendant chose not to adopt this alternative design control switch. By not adopting this alternative switch which was not cost prohibitive, Defendant rendered its paver unreasonably dangerous and therefore Plaintiff's case should have gone to the jury. Concededly it

was not that Plaintiff did not prove an alternative design at trial which never allowed that evidence to reach jury deliberation but was based upon the lower court's decision to strike Plaintiff's expert witness' testimony based on the fact the Court did not believe Plaintiff's expert had enough knowledge, skill, experience, training or education to pass the *Daubert or Kumho* gatekeeping threshold. Plaintiff argued why that ruling was erroneous in Appellant's initial brief to this Court and will not reiterate why Plaintiff's expert did in fact have the requisite training and experience and that he conducted sound reasoning and underwent scientific methodology in reaching his opinion which was enough to qualify Plaintiff's expert in this case.

In summary Plaintiff respectfully requests this Court to find that the lower court committed reversible error by misapplying the *Daubert* and *Kumho* rules to the facts in this case and that the Plaintiff should receive a new trial.

PROPOSTION #1

The Society of Automotive Engineers (SAE) Standard J297 does apply to Defendant Caterpillar's road paving machine that was the alleged cause of this accident.

The Society of Automotive Engineers (SAE) promulgates standards, which are applied to industrial equipment. The standards in question in this case are found in the 1999 SAE handbook Volume 3 on Highway Vehicles and Off-Highway Machinery. (Appellant's Appendix p. 22). It is agreed that standard J297 is a standard intended to improve operator efficiency and convenience by providing guidelines for the uniformity of location and direction of motion of operator controls used on industrial wheeled equipment. *See* SAE standard J297 (foreword and scope of J297) p. 23 Appellant's Appendix. Section 2.2.1 of SAE standard J297 defines industrial wheeled equipment as that class of tractors and associated equipment used in operations such as landscaping, construction services, loading, digging, grounds keeping, and highway maintenance. *See* Appellant's

Appendix p. 23. Defendant states that this definition does not embody Defendant's paver because pavers are not listed and that the definition does not refer to and/or apply to highway construction; it only applies to highway maintenance. *See* Appellee's response brief p. 17. Plaintiff finds no support for this distinction. First, section 2.2.1 of SAE standard J297 defines industrial wheeled equipment but that standard does not and was not intended to provide an exhaustive list of examples of industrial wheeled equipment. The very language of 2.2.1 brings Plaintiff to this conclusion. That section states "class of tractors and associated equipment used in operations ***such as...***" The language "such as" was only meant to provide a narrow list of examples for the reader to gain an understanding of what type machinery J297 was promulgated to apply. Thus, Defendant stating that J297 has no application to Defendant's paver is erroneous.

Second, Defendant in their brief to this Court states J297 only applies to construction equipment and highway maintenance equipment; thus not highway construction as Defendant's paver was so intended. *See* Appellee's Brief p. 17. A road a paving machine such as Defendant's can do either highway maintenance or highway construction. Roads have to be maintained and periodically section of roads replaced. Therefore, pavers are equipped to do both. Additionally, Defendant argues that a paver is a precision tool and thus J297 is not applicable. *See* Appellee's Brief p.17. That is not correct. Plaintiff will concede that a paver is a precision tool but that does not mean that it is not a piece of industrial equipment under the umbrella of SAE standard J297. By the very definition of precision it means that it performs a precise job. A landscaping machine or other construction machines used in industry do nothing different. These machines are designed to do precisely what they were designed to do and section J297 of the SAE standards help provide guidelines to ensure these machines are reasonably safe to operators and any other foreseeable plaintiffs.

Plaintiff's expert witness did in fact place great emphasis on standard J297 in formulating his opinion as to the

unreasonably dangerous control switch that was incorporated into the Defendant's road paving machine. However, J297 was only one resource used by Plaintiff's expert to establish a feasible alternative to the design chosen by Defendant. As Plaintiff will address in propostion #2 below, establishing a feasible alternative that is not cost prohibitive and the alternative was known or should have been known to the Defendant, helps Plaintiff carry its burden of proof. Concededly, it was not that Plaintiff did not prove a feasible alternative to the current design of Defendant's control switch that the lower court granted Defendant's motion to strike Plaintiff's expert testimony and judgment as a matter of law, but rather was because the lower court ruled that Plaintiff's expert did not pass the threshold of *Daubert* or *Kumho*. But as stated above Plaintiff relied in part on J297 of the SAE in formulating his opinion as to a feasible cost efficient alternative that the Defendant knew or should have known about. Since J297 is synonimus with guidelines which pavers such as Defendant's should or may follow, any reliance by Plaintiff's expert on this section of the SAE was not erroneous and Plaintiff seeks this Court to agree.

PROPOSTION #2

Showing that there is a feasible alternative, that a control can be designed a different way, is a factor that a jury may consider in deciding whether or not a design is unreasonably dangerous.

Under Oklahoma law, the Oklahoma Supreme Court has stated for a product not to be defective, there must be at the time of manufacturing and distribution no feasible alternative design that would accomplish the product's purpose with lesser risk. *Tansy v. Dacomed Corp.*, 890 P.2d 881, 885 (Okla. 1994). A definition of feasibility is found in Prosser & Keeton on Torts (5th ed. 1984), at p. 698: an alternative is feasible when a reasonable person would conclude that the (1) magnitude of the danger-in-fact could have been avoided by an alternative design in the (2) utilization of the scientifically available know-how reasonably

available to the defendant outweighed the (1) financial costs of guarding against such avoidable danger, (2) the impairment of the benefits, and (3) any new danger-in-fact that would be created by the alternative design.

The District Court in Illinois faced the same issues that are before this Court. In *Anderson v. Hyster Co.*, 385 N.E.2d 690 (1979), the plaintiffs were employed at a lumber company. A forklift driver stopped in front of the plaintiffs and got off his machine. Then after getting back on the driver testified that he stepped on the reverse pedal and the forklift started forward. He panicked and stepped on the right side and the forklift just sped up and hit the plaintiffs. The *Anderson* Court held that a product which is not reasonably safe by reason of defective design may be proved, by evidence of the availability and feasibility of alternative designs at the time of its manufacturer, or that the design used did not conform with the design standards of the industry, design guidelines provided by an authoritative voluntary association or design criteria set by legislation or governmental regulation. *Id.* at 692. Although not from this circuit Plaintiff argues the *Anderson* Court is on point with the issues presented for this Courts review and provides analysis of Plaintiff's position to the Court. The defendant in *Anderson* did not conform with either the design standard of the industry or the guidelines provided by the Society of Automotive Engineers (SAE) and therefore the court affirmed the lower courts jury verdicts based on the record reflecting there were alternative designs the defendants could have chosen which were not cost prohibitive or more dangerous than the current designs employed by defendants. *Id.* at 693. Plaintiffs expert offered testimony that this Defendant did not conform to SAE standard J297 which provides for a lever control as opposed to the dial control mechanism incorporated by Defendant in its current paver. By not conforming to the SAE guidelines, promulgated by some of Defendants own employees (*See* Trial Transcript Vol. I pg.84 lines 2-18; *See* also Plaintiff's exhibit number four (4a): Appellant's Appendix p. 27, which lists numerous Caterpillar employees on the SAE board that helped promulgate this standard), Defendant ignored feasible alternatives which they helped create. The Defendant created an unreasonably dangerous product which could have been designed differently and thereby given the Plaintiff an opportunity to avoid her injuries.

Plaintiff's expert was put on the stand to testify to his opinion on whether or not the Defendant's machine was unreasonably dangerous based on alternative designs that were currently present to the industry. The SAE standard J297 has been an industry standard for over twenty-seven (27) years. Therefore under the language of the Oklahoma Supreme Court in *Tansy* J297 does provide a feasible alternative which on balance accomplishes the product's purpose with a lesser risk. A control lever, as the operator of Defendant's machine had been trained on, is an alternative as promulgated by the SAE and reiterated by Plaintiff's expert, which does in fact still move the paver in the same way and poses a lesser degree of risk than the control mechanism as was incorporated into Defendant's machine.

CONCLUSION

Plaintiff respectfully requests this Court to find that the lower court committed reversible error by misapplying the *Daubert* and *Kumho* rules to the facts in this case and that the Plaintiff should receive a new trial.

CERTIFICATE OF COMPLIANCE

I, Thomas J. Steece, hereby certify that I have complied with the word and page limitation (1,990 words) in accordance with the Federal Rules of Appellate Procedure. I further certify that I have mailed the foregoing brief to the Clerk for the Tenth Circuit Court of Appeals and both counsel of record this _____ day of January, 2001.

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APPENDIX L

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May 23, 2001

Patrick Fisher
CLERK, United States Court of Appeals
Tenth Circuit
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Denver, Colorado 80257

RE:	Case No.:	00-6317
	Caption:	Alfred v. Caterpillar, Inc.
	Argument Date:	May 16, 2001
	Argument Time:	9:00 a.m.

Dear Mr. Fisher:

In accordance with Tenth Circuit Rule 28(j), Plaintiff (Appellant), Christi Alfred, submits the following supplemental authorities to be considered by the Court.

In Goebel v. Denver and Rio Grande Western R.R. Co., 215 F.3d 1083 (10th Cir. 2000), this Court addressed the issue of whether the lower District Court applied the gatekeeping function under Daubert correctly, and if not, whether reversal was warranted. This Court did reverse the lower Court's judgment for the plaintiff, noting that there "is not a single explicit statement on the record to indicate that the District Court ever conducted any form of Daubert analysis whatsoever." Id. at 1088. The defendant raised objections to plaintiff's expert witness three different times. First, defendant filed a motion in limine. Second, defendant took the expert witness on voir dire at trial. Finally, defendant filed a post-trial motion for judgment as a matter of law arguing the expert's testimony should have been stricken under Daubert. Id. at 1086, 1087.

This case is significant for the reason that the Defendant in this case did not file a motion in limine, nor did they request permission to conduct voir dire of Plaintiff's expert witness to determine the admissibility of his testimony under a Daubert analysis. And even though the defendant in the Goebel case did file a motion in limine and took the expert on voir dire, this Court determined that the lower Court failed in their responsibility as a gatekeeper. Specifically, this Court's holding in Goebel is found on page 1088 where this Court stated, "when faced with a party's objection, a District Court must adequately demonstrate by specific findings on the record that it has performed its duty as gatekeeper." In the case at bar, Judge Robin J. Cauthron, merely stated one sentence on page 148 of the trial transcript that "[I] find that his opinion is simply not competent under Daubert and other cases construing Daubert; that it is not supported by sufficient testing, experience, background, education, or thought to be relied upon by this jury." And Plaintiff points out that the lower Court ruled without pre-trial objection from the Defendant, no motion in limine, and no voir dire by either the Defendant or the lower Court.

Next, Plaintiff brings to the Court's attention the case of Macsenti v. Becker, 237 F.3d 1223, (10th Cir. 2001). This case dealt with the timeliness of defendant's objection to the plaintiff's expert witness' testimony. This Court held that "[w]e are convinced that defendant forfeited the opportunity to subject the expert testimony of the doctor and plaintiff's other experts to a Daubert challenge by failure to make a timely objection before the testimony was admitted." Id. at 1231. In Becker, the defendant did not move to strike the expert testimony until after the close of all the evidence. The Defendant in the case at bar made no objections to Plaintiff's expert witness' testimony until the close of all of Plaintiff's evidence. Plaintiff's expert was not the last witness for her case. Another witness followed Plaintiff's expert and then Defendant raised their objection.

The Plaintiff, per the Court's 10 day directive at oral arguments, hopes the Court finds the above cases and analysis useful in rendering their decision.

Respectfully submitted,

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APPENDIX M

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPEAL NUMBER: 00-6317

[Filed August 31, 2001]

CHRISTI ALFRED, individually, Appellant,	)
v.	)
CATERPILLAR® INC., a/k/a and/or d/b/a as CAT® a/k/a and/or d/b/a as CAT, a foreign corporation, Appellee.	)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

THE HONORABLE JUDGE ROBIN J. CAUTHRON

PETITION FOR REHEARHING EN BANC

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PETITION FOR REHEARING EN BANC

COMES NOW the Plaintiff, Christi Alfred, and petitions this Honorable Court for a rehearing En Bane. An opinion filed and published by the Panel judges was entered into this Court's records on August 21, 2001. Plaintiff enters her petition timely and respectfully Submits the following arguments and authorities.

STATEMENT OF WHY AN EN BANC REHEARING IS WARRANTED

A. The panel decision conflicts with a decision(s) of the Tenth Circuit Court of Appeals and consideration by the full Court is necessary to secure and maintain uniformity of the Court's decisions.

B. This proceeding involves one or more questions of exceptional importance:

1. The panel decision conflicts with other United States Courts of Appeals, whereby, this Court may bring influential and lasting precedent on the issues presented for review.

ISSUES PRESENTED FOR REVIEW

1. Whether Plaintiff's expert witness, after being duly qualified under *Daubert* as an expert in the field of mechanical engineering, may testify concerning the related application and overlapping field of human factors within the confined area of mechanical engineering?

2. If the District Court based its granting of judgment as a matter of law upon striking PlaintifFs expert witness, and now the panel has ruled that, within the realms of mechanical engineering, PlaintiWs expert did qualify to render expert opinions to the jury, is judgment as a matter of law reversible error?

3. Was the Defendant's motion to strike Plaintiff's expert witness, at the close of Plaintiff s case-in-chief, untimely under *Daubert?*

ISSUE 1

Whether Plaintiff's expert witness, after being duly qualified under *Daubert* as an expert in the field of mechanical engineering, may testify concerning the related application and overlapping field of human factors within the confined area of mechanical engineering?

In the published opinion by the Panel assigned to this case, the Court reversed in part and affirmed in part the District Court's decision to strike Plaintiff's expert testimony on the merits and affirmed the District Court's grant of judgment as a matter of law in Defendant's favor. The following arguments address why Plaintiff' s expert was qualified to testify as to human factors related to the confined area of mechanical engineering.

This Court stated, "[I]n a products liability action, an expert witness is not strictly confined to his area of practice, but may testify concerning related applications (into other areas) and a !ack of specialization does not affect the admissibility of the opinion, but only its weight. *Quinton v. Farmland Indus.*, 928 F.2d 335,337-38 (10th Cir. 1991); *Exum v. General Electric,* 819 F.2d 1158, 116364 (D.C. Cir. 1987) (registered engineer experienced in industrial safety and product design, but lacking any specific expertise in kitchen design, qualified to testify in products liability action against manufacturer of industrial fryer); *Dixon v. International Harvester Co.,* 754 F.2d 573, 580 (5th Cir. 1985) (design

engineer may provide expert testimony on safety of crawler tractor in product liability action against manufacturer despite lack of prior experience approving crawler tractor designs); *Martin v. Fleissner GMBH,* 741 F.2d 61, 64 (4th Cir. 1984) (mechanical engineers were qualified to present expert testimony in product liability action against manufacturer of synthetic fiber crimper although they lacked previous background in either crimpers or the textile industry); *Hammond v. International Harvester Co.,* 691 F.2d 646, 653 (3d Cir. 1982) (witness who had sold automotive and agricultural equipment and taught automobile repair at local high school could render expert opinion on safety of loader despite lack of formal education in either engineering or physics). An expert must, however, stay within the reasonable confines of his subject area and cannot render expert opinions on an entirely different field or discipline. *See, e.g., Stull v. Fuqua Indus., Inc.,* 906 F.2d 1271, 1275 (8th Cir. 1990) **(mechanical engineer may testify to some degree about interaction between human body and the subject mower but may not testify about human anatomy).**

In *Wheeler v. John Deere Co.,* 935 F.2d 1090, 1100 (10th Cir. 1991), this Court concluded that Sevart was a mechanical engineer with special expertise in the safe design of farm equipment. Inherent in the safe design of mechanical equipment is some anticipation of how such equipment will be perceived and used by consumers. Sevart's testimony that the combine was more dangerous than anticipated by ordinary consumers was within his expertise and, given the technical nature of the case, could have assisted the jury. *Id.* at 1101. The district court did not abuse its discretion in admitting his testimony. *See* Fed.R.Evid. 704(a) (expert witness may testify concerning ultimate issue); *Karns v. Emerson. Elec. Co.,* 817 F.2d 1452, 1459 (10th Cir. 1987) (in products liability action, court allowed expert testimony that defendant's product was dangerous beyond the expectation of average user; "facts were of a sufficiently technical nature that expert testimony could be expected to assist the jury in deciding the case").

Deere, in *Wheeler v. John Deere,* next contended that

the district court erred in allowing Wheeler's psychiatrist, Dr. Dominic Losacca, to testify that "momentary forgetfulness" is a human factor which Deere should have considered in designing the 7720 combine. Though Dr. Losacca was not a specialist in cognitive psychology, this Court agreed with the district court that his testimony was "fair game" for a psychiatrist testifying on the subject of human judgments, *Id.* at 1101. This Court concluded that, Dr. Losacca may not have been the optimal witness to speak to cognitive factors that govern product design, but such lack of specialization only affected the weight, not the admissibility of his testimony.

The Third Circuit stated, "[I]t is an abuse of discretion to exclude testimony simply because the trial court does not deem the proposed expert to be the best qualified or because the proposed expert does not have the specialization that the court considers the most appropriate." *Holbrook v. Lykes Bros, Steamship Co., Inc.*, 80 F.3d 777, 782 (3rd Cir. 1996).

Plaintiff argues that the above quoted language from this and other Courts suggests that jurors may weigh the evidence taking into account an expert's lack of specialization in a particular field. As long as an expert stays within the confines of his area of expertise for which he has been qualified as an expert to render opinions, then any overlapping .or related applications into related fields should not preclude opinions and evidence from going to the jury for their determinations. In Plaintiff's case in the District Court, Defense counsel could have cross-examined Mr. Munsell and questioned his expertise in the field of human factors, The jury could have heard that testimony and given it whatever credibility they so desired. The only testimony given by Plaintiff's expert regarding the issue of operator error was that if there was operator error it was caused by the design defect in the control mechanism on the Caterpillar machine. *(See* Trial Transcript Vol.1 pg. 133-134 lines 24-6 (Appendix p.2)). Mr. Munsell went on to state that in the back of every mechanical engineer's mind is the issue of human factors and how they relate to product designs.

The field of human factors has related application to the field of mechanical engineering and based upon the precedent and case law established by this Court and other Federal Courts around this Country, the Plaintiff respectfully urges this Court to rule and affirm the Panel that Plaintiff's expert witnesses testimony was within the confines of a mechanical engineer and that his related application of human factors, as it applies to mechanical engineering and thc design of products, was only incidental, and related to his testimony as an expert in the field of mechanical engineering.

ISSUE 2

If the District Court based its granting of judgment as a matter of law upon striking Plaintiff's expert witness, and now the panel has ruled that, within the realms of mechanical engineering, Plaintiff's expert did qualify to render expert opinions to the jury, is judgment as a matter of law reversible error?

The District Court made the following observations:

> I find that his opinion is simply not competent trader *Daubert;* that it is not supported by sufficient testing, experience, background, education, or though to be relied upon by this jury. **Without that opinion, I think it's quite clear that there is no evidence on which this case can go to the jury, *and it is for those reasons and on that basis* that I grant the Defendant--first, the Defendant's motion to strike the expert testimony and, secondly, its Rule 50 motion for judgment as a matter of law.**
>
> (Appellant's App, at 8-9.).

As argued above, the Panel determined that Mr. Munsell (Plaintiff's expert witness) was qualified to give his opinion as it related to the field of mechanical engineering.

However, the Panel affirmed the District Court's overall ruling based upon his testimony in the field of human factors. As argued above, Plaintiff believes that based on case law and precedent, Mr. Munsell is qualified to tell the jury how human factors relates to mechanical engineering, And if that is true, then the whole District Court's ruling should be reversed because the Honorable Judge Cauthron's entire reason for granting Defendant's motion for judgment as a matter of law was without Plaintiff's expert (after being stricken), Plaintiff could not carry her burden.

Plaintiff argues that judgment as a matter of law was erroneously granted in this case and respectfully moves this Court to reverse the District Court's ruling and remand for further proceedings.

ISSUE 3

Was the Defendant's motion to strike Plaintiff's expert witness, at the close of Plaintiff's case-in-chief, untimely under *Daubert?*

During the lower court proceedings, the Defendant never filed a motion in limine (even after the close of all discovery) to limit Mr. Munsell's testimony as an expert for the Plaintiff. When Mr. Munsell took the witness stand at the time of trial, the Defendant never moved the District Court to voit dire Mr. Munsell and test his reliability and qualifications as an expert in this case. It was not until the close of Plaintiff's case-in-chief, that Defendant moved to strike Mr. Munsell's testimony and for judgment as a matter of law. In *Macsenti v. Becker,* 237 F.3d 1223, 1230-34 (10th Cir. 2001), this Court affirmed a district court's rejection of *Daubert* objections raised by a defendant at the close of all the evidence. In doing so, this Court concluded "that Defendant forfeited the opportunity to subject the expert testimony of the plaintiff's expert(s) to a *Daubert* challenge by failure to make a timely objection before the testimony was admitted. *Id.* at 1231. Although the *Macsenti* decision was based on waiver of *Daubert* and not on the merits like this case, Plaintiff respectfully argues that the Defendant's timing of their motion

was ill appropriate and placed Plaintiff in a "surprised" position at the time of trial after having submitted all of Plaintiff's evidence.

CERTIFICATE OF SERVICE

I hereby certify that I have mailed tile foregoing brief to the Clerk for the Tenth Circuit Court of Appeals and both counsel of record this 31st day of August, 2001.

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Respectfully,

/s/_____
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Tenth Circuit Petition for Rehearing En Banc

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 00-6317

[Filed August 21, 2001]

CHRISTI ALFRED, Plaintiff-Appellant,	)
v.	)
CATERPILLAR, INC., a foreign corporation, doing business as CAT, also known as CAT, Defendant-Appellee.	)

Appeal from the United States District Court
for the Western District of Oklahoma

(D.C. No. CV-99-14-C)

Thomas J. Steece (Steven R. Jung and Mark A. Mathews with him on the brief), Steece, Mathews & Associates, P,C., Oklahoma City, Oklahoma, for the Plaintiff-Appellant.

James A. Jennings, III (W.T. Womble, Womble & Cotellesse, Houston, Texas, with him on the brief), Jennings Cook & Hoisington, Oklahoma City, Oklahoma, for the Defendant-Appellee.

Before **BRISCOE**, **BALDOCK**, and **LUCERO**, Circuit Judges.

LUCERO, Circuit Judge.

* * *

[p.2]

Plaintiff Christi Alfred was on active duty with the United States Navy when she was severely injured by a paver manufactured by defendant Caterpillar. In this product liability suit, she alleges the payer's design was defective and that the defect caused her injury. At the close of her case, the district court struck the testimony of plaintiff's expert witness and granted defendant's motion for judgment as a matter of law under Fed. R. Civ. P. 50(a). Plaintiff challenges both rulings. We again address the issue of timing of Daubert motions, and exercising jurisdiction pursuant to 28 U.S.C. § 1291, we reverse in part and affirm in part the district court's decision to strike plaintiff's expert testimony on the merits and affirm the trial court's grant of judgment as a matter of !aw in defendant's favor.

I

Alfred was assigned to a construction battalion at thc United States Naval Base in Rots, Spain. While giving hand signals to the operator of an asphalt paver, Alfred was ordered to stand between the paver and a tree. Nearing the tree, the operator stopped the paver on plaintiff's signal, but upon her subsequent order to reverse direction the operator mistakenly moved the paver forward, pinning her against the tree. His mistake appears to have consisted of failing to place the direction toggle switch into reverse mode before turning the rotary dial that controls the vehicle's speed, As a result of the accident, plaintiff's right leg was injured and later amputated below the knee.

Plaintiff alleges the paver's control mechanism is defective because it is counterintuitive; defendant responds that the accident was caused by human error and that the mechanism is not defective or unreasonably dangerous. At trial, plaintiff admitted that the operator made a mistake with the controls and that she should not have been standing between the paver and the tree.

To prove her case plaintiff relied on the testimony of her liability expert, William P. Munsell, that the paver contained a defect that made it unreasonably dangerous and

caused plaintiff's injury--two of the elements of a manufacturer's product liability cause of action in Oklahoma. *See Alexander v. Smith & Nephew, P.L.C.*, 98 F. Supp, 2d 1310, 1318 (N.D. Okla. 2000) (citing *Kirkland v. Gen. Motors Corp*, 521 P.2d 1353, 1363 (Okla. 1974)). Munsell, a mechanical engineer, testified that the use of a rotary variable speed control instead of a lever was "not intuitive" and was a direct cause of plaintifFs injury. (Appellee's App. at 40.) Plaintiff's only evidence regarding defendant's liability for product design was Munsell's testimony.

After plaintiff rested, defendant moved to strike Munsell's testimony on the ground that he was not qualified by knowledge, skill, training, or education to offer opinion testimony in the case and that he had done insufficient research to support his conclusion that the paver was defective in design. Defendant concurrently moved for judgment as a matter of law under Fed. R. Civ. P. 50(a). The court granted the motion to strike and, concluding that without Munsell's opinion plaintiff's case was not supported by the evidence, proceeded to grant judgment as a matter of law for defendant. The court made the following observations:

> Mr. Munsell gave an opinion that was very limited and it was backed by very little work and very little expertise. I think Mr. Jennings has covered all that at the bench and it need not be repeated.
>
> The only actual investigation that he did was to find a machine that had the lever rather than the dial in order to satisfy himself that it was possible, and to identify for the benefit of the jury the guidelines and standards on which he based his conclusion.
>
> Aside from identifying those guidelines and standards, however, he has done no work that supports his conclusion that they are' prohibited, that the design of this machine is

> defective, or that the guidelines and standard apply even to the mechanics of this machine.

I find that his opinion is simply not competent under *Daubert* and other cases construing *Daubert*; that it is not supported by sufficient testing, experience, background, education, or thought to be relied upon by this jury. Without that opinion, I think it's quite clear that there is no evidence on which this case can go to the jury, and it is for those reasons and on that basis that I grant the defendant--first, the defendant's motion to strike the expert testimony and, secondly, its Rule 50 motion for judgment as a matter of law.

(Appellant's App. at 8-9.)

II

Rule 702 of the Federal Rules of Evidence authorizes a "witness qualified as an expert by knowledge, skill, experience, training, or education" to give opinion testimony "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Consistent with the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, Rule 702 requires trial courts to act as gatekeepers, admitting only expert testimony that is both reliable and relevant. 509 U.S. 579, 589 (1993). "This gatekeeper function requires the judge to assess the reasoning and methodology underlying the expert's opinion, and determine whether it is scientifically valid and applicable to a particular set of facts." *Goebel v. Denver & Rio Grande. W.R.R.Co.*, 215 F.3d 1083, 1087 (10th Cir. 2000) (citing *Daubert*, 509 U.S. at 592).

A

We turn briefly to the timeliness of defendant's motion to strike expert testimony after the close of plaintiffs case. In our recent decision of *Macsenti v. Becket*, 237 F.3d 1223, 1230-34 (10th Cir. 2001), this Court affixed a district court's

rejection of *Daubert* objections raised by a defendant at the close of all the evidence. In doing so, we concluded "that Defendant forfeited the opportunity to subject the expert testimony of [the] plaintiffs ... experts to a *Daubert* challenge by failure to make a timely objection before that testimony was admitted." *Id.* at 1231.

Recognizing that the law traditionally does not reward ambush trial tactics, in *Macsenti* this Court correctly criticized the practice of filing *Daubert* motions at a late stage in the adversarial process when there has been no motion in limine or concurrent objection to an expert's participation. Counsel should not "sandbag" *Daubert* concerns until the close of an opponent's case, thereby placing opposing counsel and the trial court at a severe disadvantage. *See Macsenti*, 237 F.3d at 1233-34, The truth-seeking function of litigation is best served by an orderly progression, and because *Daubert* generally contemplates a "gatekeeping" function, not a "gotcha" junction, *Macsenti* permits a district court to reject as untimely *Daubert* motions raised late in the trial process; only in rare circumstances will such tardy motions, albeit allowed under our decision in *Goebel* warranted. 215 F.3d at 1087 (indicating a district court can satisfy its *Daubert* gatekeeping role "when asked to rule on a motion in limine, on an objection during trial, or on a post-trial motion"). In this case, unlike in *Macscnti*, the district court chose to address the defendant's *Daubert* objections on the merits, rather than deeming them waived. Because of the split character of our disposition on the merits--affirming in part and reversing in part the decision to strike Munsell's testimony we elect not to reach the issue of the motion's belated consideration, leaving for another day further development of Macsenti's timing jurisprudence.

B

Our review of a trial court's exercise of its *Daubert* gatckeeping function is for abuse of discretion. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136. 139 (1997); *Goebel*, 215 F.3d at 1087; *Mitchell v. Gencorp, Inc.* 165 F.3d 778, 780 (10th

Cir. 1999). Under an abuse of discretion standard, a ruling will not be disturbed on appeal unless it is "arbitrary, capricious, whimsical or manifestly unreasonable" or when this Court is convinced that the trial court "has made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Atlantic Richfield Co. v. Farm Credit Bank of Wichita,* 226 F.3d 1138, 1163 (10th Cir. 2000) (citations omitted).

Plaintiff argues Munsell's testimony qualified as admissible expert testimony under the requirements of Rule 702 and *Daubert* and therefore was erroneously stricken. Munsell's testimony was based on engineering standards promulgated by the Society of Automotive Engineers ("SAE") as well as on his investigative work. Citing SAIE Standard J297, entitled "Operator Controls on Industrial Equipment," he opined that the variable speed control on a paver should be in the form of a lever rather than a rotary dial. Because the paver involved in the litigation was equipped with a rotary dial instead of a lever, he concluded, its design was defective for failing to meet the SAE standard testimony was relevant--meeting the other--because although it is not dispositivc and might be countered by conflicting testimony, it could allow the jury to infer Caterpillar's paver was defective for failing to meet industry design standards. Because that portion of his opinion qualified as admissible expert testimony under Rule 702 and *Daubcrt*, we hold that striking Munsell's testimony as to thc payer's failure to comply with SAE J297 was an abuse of the trial court's discretion.

Munsell admitted that the factual issues at trial also concerned "a field of expertise known as human factors." (Appellee's App. at 51) Not only did Munsell acknowledge that there are specialists in human factors and that he is not one, but he also testified that his knowledge of that specialty was gained during a trip to the library the week prior to trial, *after* he had arrived at his opinion regarding thc Caterpillar paver. Munsell conceded he had only looked at one paver during his preparation for the case, and that he had never seen a paver of thc type involved in the accident or researched the

control mechanisms of any types of pavers other than the one he saw. We found no indication in thc rccord that Munsell had ever evaluated a paver prior to this litigation.

Those admissions demonstrate that Munsell's qualifications in the field of human factors wer. e inadequate and that his field research and preparation for trial were cursory, undermining the reliability of his opinion that the Caterpillar payer's control mechanism is "not intuitive" to paver operators. (Appellee's App. at 40) The only information Munsell was qualified to provide based on his experience and field research was that at least one manufacturer of pavers used levers instead of rotary dials for variable speed control. (See Appellee's App. at 48 ("I just know that levers are feasible,").) The trial court was well within its discretion in concluding, first, that the existence of one paver equipped with a lever instead of a rotary dial, standing alone, does not constitute relevant "specialized knowledge" that could help the jury to determine a fact in issue and, second, that Munscll was not "qualified as an expert" in the relevant field of human factors. Fed. R. Evid. 702. "The trial judge is granted great latitude in deciding which factors to use in evaluating the reliability of expert testimony "United States v. Charley, 189 F.3d 1251, 1266 (10th Cir. 1999). The trial judge's statement accompanying her ruling was sufficiently detailed to indicate she had conducted an adequate *Daubert* analysis. *Cf. Goebel*, 215 F.3d at 1085 (holding a trial court's *Daubert* ruling inadequate where there was "not a single explicit statement on the record to indicate that the district court ever conducted any form of *Daubert* analysis whatsoever").

We reverse only the decision to strike that part of Munsell's testimony regarding compliance with SAIE standards and affirm the balance of the *Daubert* ruling based on Munsell's lack of experience and training in human factors

engineering, expressing no opinion on the merits of those aspects of the testimony. That, however, does not end the matter.

Questions remain whether the grant of judgment as a matter of !aw in defendant's favor would have been permissible had Munsell's testimony regarding Caterpillar's noncompliance with SAE standards remained a part of the evidence and been properly credited in the JMOL analysis.

III

We review de novo a grant of judgment as a matter of law. *Phillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 796 (10th Cir. 2001). Rule S0 "allows the trial court to remove cases or issues from the jury's consideration 'when the facts are sufficiently clear that the law requires a particular result.'" *Weisgram v. Marley Co.*, 528 U.S. 440, 448 (2000) (quoting 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2521, at 240 (2d ed. 1995)). Munsell's testimony regarding the failure of the speed control mechanism to comply with SAE J297, standing alone, was insufficient to allow a reasonable finder of fact to conclude the paver was defective and unreasonably dangerous. Although the fact that a piece of equipment fails to comply with published engineering standards may allow a jury to infer that thc product is defective, it does not establish, by itself, that the defect made the product unreasonably dangerous to an extent beyond that which would be contemplated by the ordinary consumer. *See Bohnstedt v. Robscon Leasing L.L.C.*, 993 P.2d 135, 136 (Okla. Civ. App. 1999) (setting forth the essential elements of a products liability action under Oklahoma law), Aside from Munsell's testimony, plaintiff introduced no additional evidence to show defective design or unreasonable dangerousness. Thus, we conclude there was an inadequate residuum of evidence that could support a reasonable jury verdict favoring plaintiff's product liability claim.

IV

The district court's grant of judgment as a matter of law in favor of defendant is **AFFIRMED**.

Supreme Court, U.S.
FILED
FEB 4 2002
CLERK

(2)

No. 01-969

In The

Supreme Court of the United States

CHRISTI ALFRED,

Petitioner,

v.

CATERPILLAR INC., a/k/a and/or d/b/a CAT, a/k/a and/or d/b/a CAT, a foreign corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Although Petitioner poses five questions for review, in reality all such questions are answered by a single inquiry: Under Federal Rule of Evidence 702 and this Court's opinions in *Daubert and Kumho Tire*, was the trial court authorized and empowered, after full consideration of the proffered expert's trial testimony, to find that the testimony lacked evidentiary reliability, and to strike portions of that witness' testimony due to the witness' inadequate qualifications and insufficient methodology?

CORPORATE DISCLOSURE STATEMENT

Respondent, Caterpillar Inc., has no parent corporation. No publicly held company owns ten percent or more of its stock.

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STATEMENT OF THE CASE

Petitioner, a United States Navy Seabee on active duty, was injured when the operator of a Caterpillar asphalt paver, a fellow United States Navy Seabee, moved the machine forward instead of backward, and struck her. In this manufacturer's products liability action, Petitioner alleged that the paver, a very specialized and precise piece of construction equipment requiring precise speed control, was defective in design and unreasonably dangerous. In particular, the paver was criticized because it had a variable speed dial control rather than a lever control. Respondent, Caterpillar Inc., denied that the paver was defective or unreasonably dangerous.

At trial, Petitioner presented but two witnesses who addressed the circumstances of the accident and the alleged product defect; i.e., Petitioner and Petitioner's proffered "expert," William P. Munsell. The focus of Mr. Munsell's testimony was his opinion that the speed control dial's design was "counter-intuitive," a topic which fell within a recognized scientific field known as "human factors engineering." Mr. Munsell was not a human factors engineer and otherwise lacked appropriate qualifications and experience in that area. Petitioner failed to present any probative evidence relating to whether the claimed defect rendered the paver unreasonably dangerous under Oklahoma law.

After Petitioner rested, Respondent moved to strike the testimony of Mr. Munsell pursuant to Federal Rule of Evidence 702 and this Court's opinions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct.

2786, 125 L. Ed. 2d 469 (1993) and *Kuhmo Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). Concurrently, Respondent moved for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure for the reason that the evidence, when taken in the light most favorable to the Petitioner, did not establish a *prima facie* basis for the required elements of the asserted cause of action, manufacturer's products liability.

After evaluating Mr. Munsell's qualifications and methodology, and after oral presentations of positions by both Petitioner's counsel and Respondent's counsel, the trial court concluded that the witness was not sufficiently qualified by experience, background or education to render opinions, and that the methodology he utilized was likewise lacking and insufficient. Engaging in a two step process, the trial court made detailed findings concerning the basis for its conclusions, then struck the "expert" testimony. Immediately thereafter, the trial court also granted Respondent's motion for judgment as a matter of law, concluding that there was no proof of a defect and no proof that the paver was unreasonably dangerous, as required by Oklahoma law.

After full consideration of briefs submitted by Petitioner and Respondent, consideration of the record before it, and oral argument, the United States Court of Appeals for the Tenth Circuit concluded that the trial judge had erred in but one respect. It found that Mr. Munsell's opinion of the speed control mechanism's noncompliance with a voluntary industry standard (SAE J297) was sufficiently reliable and relevant to be admissible. Accordingly, the Tenth Circuit reversed the decision striking that

portion of his testimony. The remaining rulings of the trial judge were affirmed, including her ruling that Mr. Munsell's qualifications and methodology in the area of "human factors" were insufficient.

The Tenth Circuit reviewed *de novo* the granting of judgment as a matter of law in favor of the Petitioner, and independently concluded that although the Respondent's suggested failure of the speed control dial to comply with a published standard could have allowed the jury to infer a defect in the paver, there was no evidence that any such defect made the paver unreasonably dangerous to an extent beyond that which would be contemplated by the ordinary consumer, as defined by Oklahoma law. Thus, the Tenth Circuit independently concurred with the trial judge in finding the evidence inadequate to support a jury verdict in favor of the Petitioner under Oklahoma law. Judgment as a matter of law in favor of the Respondent was affirmed..

SUMMARY OF RESPONDENT'S POSITION

Pursuant to Rule 10 of the Rules of the Supreme Court of the United States, a petition for a writ of certiorari will be granted only for compelling reasons. A compelling reason is not present here. Respondent asserts that this Court is not faced with a case in which a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter, and has not departed from the accepted and usual course of judicial proceedings or sanctioned a departure by a lower court. Further, a United States court of appeals has not decided

an important question of federal law that has not been settled by this Court or decided an important federal question in a way that conflicts with relevant decisions of this Court.

Petitioner's suggestions that both her Fifth and Seventh Amendment rights have been violated is without factual or legal merit. Petitioner's claim of lack of notice is baseless, as the Federal Rules of Evidence and decisions of this Court have long made it clear that expert witnesses must be qualified and use appropriate methodology so that their opinions are reliable and of assistance to the jury. Since 1993, all parties to lawsuits have likewise been on notice of the trial judge's specific gatekeeper function and responsibility. Likewise, plaintiffs in manufacturer's products liability cases tried under Oklahoma law have since 1974 been on notice of the elements of the cause of action they must prove in order to prevail. Since at least 1988, plaintiffs have been on notice of proof requirements relating to establishing that a defect made a product unreasonably dangerous.

Petitioner had a full opportunity to put on her best case relating to Mr. Munsell's qualifications and methodology. Petitioner had a full hearing prior to the trial judge striking the testimony of the proffered expert. Petitioner advanced her best argument in both the trial court and Tenth Circuit in support of her proposition that Mr. Munsell was properly qualified and used appropriate methodology. Yet, the truth is that regardless of the timing of a challenge to Mr. Munsell's qualifications and methodology, or the timing of the trial court's *Daubert* analysis and findings, the witness could not properly testify in certain areas. Petitioner has had a complete appellate review of the trial court judge's rulings after a

thorough study of the record and oral argument, and a supplemental submission of legal citations. The process and procedure used throughout the trial and appeal was in complete compliance with Petitioner's Fifth and Seventh Amendment rights.

This Court has on numerous occasions concluded that the procedure set forth in Rule 50 of the Federal Rules of Civil Procedure complies with the Seventh Amendment. *Berry v. United States*, 312 U.S. 450, 61 S. Ct. 637, 85 L. Ed. 945 (1941); *Galloway v. United States*, 319 U.S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458 (1943); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 61 S. Ct. 189, 85 L. Ed. 147 (1940); *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 87 S. Ct. 1072, 18 L. Ed. 2d 75 (1967); *Daubert*, at 596.

The United States courts of appeals are not split on the issue of whether the trial judge can act as a gatekeeper in the absence of a motion *in limine*[1] or a pretrial hearing on the admissibility of evidence. Petitioner has failed to cite any case where the trial judge was not permitted and encouraged to make a decision on expert witness qualifications and methodology prior to submission of the case to the jury. Cases cited by the Petitioner involve issues not present in this case. Cases wherein a

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[1] This is recognized by this Court as a motion filed before or during trial to exclude anticipated prejudicial evidence before the evidence is actually offered. The trial judge is not required to decide such a motion. Any ruling on such a motion is preliminary or advisory and is subject to change as the trial unfolds. *Luce v. United States*, 469 U.S. 38, 40-42, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984); *Jones v. Stotts*, 59 F.3d 143, 146 (10th Cir. 1995).

delayed motion was urged and the trial judge refused to disallow challenged expert testimony have no relevance to this matter.

Here, unlike the factual scenario which placed the trial judge at a disadvantage in *Macsenti v. Becker*, 237 F.3d 1223 (10th Cir. 2001), *cert. denied*, 121 S. Ct. 2593, 150 L. Ed. 2d 752 (2001), the trial judge was not prejudiced by the timing of the motion. The trial judge herein properly elected to consider the motion relating to the proffered expert's qualifications and methodology, and was able to and did make specific findings as to why the testimony of the witness was excluded. The timing of the motion in the cases cited by Petitioner affected only the appellate standard to be applied when reviewing the trial judge's decision, abuse of discretion or plain error, not the authority of the trial judge to act as gatekeeper. Significantly, in this case the trial judge and the Tenth Circuit proceeded in a manner affirmed by this Court in *Weisgram v. Marley Company*, 528 U.S. 440, 455-456, 120 S. Ct. 1011, 145 L. Ed. 2d 958 (2000). Both courts concluded that Mr. Munsell was not qualified and performed insufficient work to provide reliable testimony, which would have been of assistance to the jury. Accordingly, both courts properly struck his testimony, then ruled that Petitioner's evidence was insufficient to support a verdict or judgment in Petitioner's favor.

Petitioner's Petition for Writ of Certiorari should be denied.

REASONS WHY THE WRIT SHOULD BE DENIED

A. NO CONSTITUTIONAL VIOLATION OCCURRED AS PETITIONER HAD NOTICE OF THE NECESSITY OF PRESENTING A PROPERLY QUALIFIED EXPERT WHO EMPLOYED SATISFACTORY METHODOLOGY

This is not a case of the deprivation of a constitutional right, under either the Fifth Amendment or the Seventh Amendment. Rather, this is a case where Petitioner failed to utilize a properly qualified and prepared expert witness, and failed to introduce necessary proof to establish a cause of action for jury submission under Oklahoma law. Petitioner's repeated assertion that she was without notice that a challenge to her expert's qualifications and methodology might be forthcoming is without merit or substance. Likewise, Petitioner's suggestion of improper conduct on the part of Respondent, the United States District Court for the Western District of Oklahoma, and the United States Court of Appeals for the Tenth Circuit is without merit or substance.

Petitioner commenced her lawsuit by filing her Complaint on January 6, 1999. A brief review of the status of both the Federal Rules of Evidence and interpretive decisions existing as of the dates of the filing of the Complaint and trial proceedings conclusively demonstrates Petitioner was on notice from the outset of the necessity of an appropriately qualified expert to testify in support of her case. This Court's decision in *Daubert* was rendered on June 28, 1993. Later, by its *Kumho Tire* decision rendered on March 23, 1999, this Court reinforced its *Daubert* ruling, and clarified that the trial court's *Daubert* "gatekeeping" obligation applied to all expert testimony. This

Court specifically noted that Federal Rule of Evidence 702 applied to all expert testimony. In the more recent *Weisgram* opinion, decided February 22, 2000, almost seven months prior to the August 14, 2000, trial in this case, this Court stated, at pp. 455-456:

> Since *Daubert*, moreover, parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet. 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469; see also *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) (rendered shortly after the Eighth Circuit's decision in Weisgram's case); [footnote omitted] *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997). It is implausible to suggest, post-*Daubert*, that parties will initially present less than their best expert evidence in the expectation of a second chance should their first try fail. We therefore find unconvincing Weisgram's fears that allowing courts of appeals to direct the entry of judgment for defendants will punish plaintiffs who could have shored up their cases by other means had they known their expert testimony would be found inadmissible.

Finally, by way of a June 12, 2000 decision issued by the United States Court of Appeals for the Tenth Circuit, *Goebel v. Denver and Rio Grande Western Railroad Company*, 215 F.3d 1083, 1087 (10th Cir. 2000), Petitioner was on notice of the Tenth Circuit's position with respect to the timing of a district court's fulfillment of its gatekeeper role. In *Goebel*, the Tenth Circuit specifically indicated that the district court may "satisfy its gatekeeper role when asked to rule on a motion in limine, on an objection

during trial, or on a post-trial motion so long as the court has sufficient evidence to perform 'the task of insuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.' "

Petitioner also had notice that qualifications in the "human factors" field of expertise would be at issue in this case, both from development of the theory of her case prior to its filing on January 6, 1999, and from Respondent's identification and use of Richard Krenek, Ph. D., as an expert witness. (Tr. Trans. p. 131).[2]

B. THE UNDERLYING COURTS HAD THE RESPONSIBILITY AND AUTHORITY TO EXCLUDE THE TESTIMONY OF PETITIONER'S PURPORTED EXPERT

Petitioner impliedly suggests that defense decisions and the timing of defense motions can in some manner limit the authority of the trial judge, or duty of the trial judge, to perform the gatekeeper function. To accept this suggestion would, in effect, render the trial courts and the appellate courts powerless to eliminate unreliable evidence and testimony of an unqualified witness from jury deliberations. Further, it would, in effect, make counsel for the parties the ultimate gatekeepers. In essence, Petitioner asks this Court to grant certiorari to rule that the trial court and Tenth Circuit should have allowed

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[2] All references to "Tr. Trans." are to the Reporter's Transcript of Proceedings Had Monday, August 14, 2000 Before The Honorable Robin J. Cauthron, Judge Presiding.

unreliable and legally insufficient evidence to be submitted to the jury for deliberation solely because Respondent's counsel moved to strike after the testimony was complete rather than moving in advance to prohibit the testimony.

This is not a case where the trial judge was incapable of or failed to perform an evaluation of the qualifications of a proffered expert or the reliability of that expert's testimony. To the contrary, this is a case where the trial judge fully performed those duties and made detailed findings as to the deficiencies in both the qualifications and methodology of the proffered expert. The trial judge performed her role after review of the totality of the trial testimony of the proffered expert, including direct examination, cross examination, re-direct examination, and re-cross examination. Contained within the testimony of the purported expert was a thorough exploration of his qualifications and his limited case-specific work. The decision of the trial judge was made prior to the submission of the case to the jury. The trial transcript reveals that before excusing the witness, Petitioner's counsel recognized the need to and attempted to bolster Mr. Munsell's qualifications on re-direct examination. (Tr. Trans. pp. 130-132). The record further demonstrates that counsel for both Petitioner and Respondent were given a full opportunity to argue their respective positions to the trial judge prior to the rulings on the motions. Additionally, the record reveals that the trial judge independently evaluated Mr. Munsell's testimony, as is shown by her recitation of the inadequacies of his qualifications and methodology.

Petitioner urges that the trial court in some manner violated the requirements of Federal Rule of Evidence

104(a) by failing to rule on the qualifications of Mr. Munsell at some point prior to the completion of his testimony. However, the law places no requirement on the trial judge to make such a determination prior to the completion of the testimony. The trial judge is granted great flexibility and discretion as to the manner and timing of discharging his or her assigned duties. Indeed, pursuant to Rule 104(e), the trial judge was authorized to allow the jury to hear evidence of Mr. Munsell's qualifications and methodology, as that evidence could have been relevant to the weight or credibility to be given to the witness' testimony, had it ultimately been properly submitted to the jury for deliberation. *United States v. Nichols*, 169 F.3d 1255, 1263-1264 (10th Cir. 1999), *cert. denied*, 528 U.S. 934, 120 S. Ct. 336, 145 L. Ed. 2d 262 (1999). In this case, the trial judge specifically stated on the record that she was aware of no prohibition against moving to strike testimony rather than moving *in limine* ahead of trial, and that it was often easier and more efficient to make such a ruling after the testimony has been given at trial rather than to have a "full-blown hearing" prior to trial. (Appendix G to Petition for Writ of Certiorari, pp. 47a-48a; Tr. Trans. p. 147).

The Advisory Committee Notes to the 2000 Amendments to Rule 702 of the Federal Rules of Civil Procedure make it clear that the proponent of expert testimony has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence, citing *Bourjaily v. United States*, 483 U.S. 171 (1987). Petitioner did not meet the required burden. Petitioner's adverse result arose not from the timing of the motions

made by Respondent, but rather from the lack of qualifications and methodology of the witness the Petitioner chose to utilize. These deficiencies in qualifications and methodology were incurable. Petitioner did not seek to reopen her case, but such a request would have made no difference. The result would not have changed had Respondent 1) filed a motion *in limine* by the August 1, 2000 deadline for filing of pretrial motions set by the trial court, 2) included a specific challenge to Mr. Munsell in the Final Pretrial Report filed on August 11, 2000, or 3) made an oral motion immediately before or during the trial testimony of Mr. Munsell on August 14, 2000. Petitioner's witness and proof were simply insufficient to establish her case under Oklahoma substantive law.

C. A JURY COULD NOT HAVE FOUND THE SUBJECT PAVER WAS UNREASONABLY DANGEROUS

1. William P. Munsell's Testimony

Mr. Munsell, a degreed mechanical engineer, was, at the time of trial, a registered professional engineer with the Oklahoma Society of Professional Engineers. According to his testimony, he had specialized in failure analysis and evaluation of industrial accidents for nine years. However, examination of his underlying qualifications and methodology revealed even the bare necessities to allow his testimony in the areas of human factors and consumer expectation were absent. Mr. Munsell's description of his experience in the areas of failure analysis and evaluation of industrial accidents included consideration of fire fighting equipment, forklifts, off road

forklifts, smaller forklifts, tractors, cranes, cars, front-end loaders, radial arm saws, punch presses and press brakes, but not pavers. (Tr. Trans. p. 67). Although he had looked at control systems for different products in the past, he looked at the control system of *only one other paver* prior to testifying, and that was purely for purposes of this litigation. (Tr. Trans. pp. 96-97).

In preparation for his testimony in this litigation, Mr. Munsell also reviewed the United States Navy Investigation Report of the accident, some photographs of the machine at issue, brochures of exemplar machines (not pavers) and looked at excavators, bulldozers, and rollers. (Tr. Trans. pp. 70-71). The one other paver that he examined was manufactured by another company. (Tr. Trans. p. 95). In support of his opinion relating to the "counter-intuitive" nature of the Caterpillar paver speed dial, Mr. Munsell had looked at his kitchen stove and his faucet. (Tr. Trans. p. 78). He also traveled to a Sears store and looked at stoves, humidifiers, and a fan. (Tr. Trans. p. 79). The witness did not view the subject paver, did not look at the controls of pavers manufactured by other companies (except the one other manufacturer's paver examined for this litigation), and did not have knowledge of the types of controls found on other pavers used in the construction industry around the world. (Tr. Trans. pp. 96-97). Mr. Munsell had never operated a paver, had never been involved in the paving business, had never gotten on a paving machine or watched the operator of a paving machine use the controls. (Tr. Trans. pp. 99-100).

Mr. Munsell acknowledged that controls of the machine and the way an operator used controls was a part of human factors, an acknowledged specialty. (Tr.

Trans. p. 100). Mr. Munsell acknowledged that he was not a human factors engineer, acknowledged that there were people who specialized in human factors engineering, acknowledged that there was literature on controls and the way controls should operate, and acknowledged that he only looked at a human factors design text after he had reviewed Respondent's human factors expert's report, one week before trial and months after he had given his deposition. (Tr. Trans. pp. 100, 102).

Mr. Munsell testified that he had worked at Lowrance Electronics for one year, but that business made fishing equipment, sonars, and GPS satellite navigation equipment, not pavers. (Tr. Trans. pp. 109-110). He acknowledged that the people who would typically use the subject paver were people in the paving industry, people who were knowledgeable about pavers. (Tr. Trans. pp. 111-112). Mr. Munsell agreed that the "standard" about which he testified was in the nature of a suggestion, not the law, and a mere voluntary practice or guideline. (Tr. Trans. pp. 119-121). The witness also agreed that during the time he was performing his investigation to arrive at his opinions he did not consult any human factors literature. He performed no testing of any kind prior to arriving at his final opinions. (Tr. Trans. pp. 127, 129).

Mr. Munsell testified that the paver was equipped with a toggle switch which when raised up caused the paver to move forward and when lowered caused the paver to move in reverse. He acknowledged that the switch was labeled accordingly. (Tr. Trans. p. 91). He further testified that the paver had a speed control dial which when turned clockwise caused the paver to move

faster and which when turned counterclockwise caused the paver to move slower. The paver speed control dial was labeled accordingly. (Tr. Trans. pp. 92-93). Mr. Munsell conceded that the paver was thought of in the construction industry as a precision machine that needed speed control, which was as accurate as possible. Precision of the speed affected how the job was performed. (Tr. Trans. pp. 98-99). Mr. Munsell agreed that the paver was equipped with a backup alarm that sounded when the paver was placed in reverse. If the paver was in forward, no backup alarm sounded. (Tr. Trans. p. 103). He testified that there were several different procedures identified in the operator's manual to stop the paver, one of which was turning the speed dial to slow speed. An existing foot brake was another device, which could be used to stop the paver. (Tr. Trans. pp. 132-134).

2. Christi Alfred's Testimony

Petitioner's own testimony revealed the specialized area in which she was working at the time of her accident. Petitioner joined the United States Navy in March of 1996. (Tr. Trans. p. 22). After completing basic training, she was sent to an EOA school, where she was given heavy equipment operator's advanced schooling. She spent a week per machine on front end loaders, bulldozers, scrapers, forklifts, dump trucks, and diesel engines, where she learned about the mechanics and operation of the machines. That heavy equipment operator training program lasted for two to two and one-half months. (Tr. Trans. p. 23). Afterwards, she was assigned to a heavy equipment operator's yard in California and

was specifically trained on a paving machine for one to two days. Petitioner was subsequently assigned to Rota, Spain in January of 1997 and assigned to a paving crew. (Tr. Trans. p. 24). She was a screed operator, a person who stood on the back of the paver and measured the depth and width of the asphalt as it came through the machine. Petitioner had driven the subject machine, but not operated it to lay asphalt. (Tr. Trans. pp. 24-25, 42).

3. Stipulated Exhibits

Also introduced into evidence as a stipulated exhibit was a Navy investigation report, which concluded that the accident occurred because the operator made a mistake with the controls that caused the paver to move forward when he intended to stop it and reverse it. This report concluded that the operator had insufficient training to operate the paver and that there were no mechanical problems with the machine. The report concluded that the paver was equipped with a switch, which when raised up caused the paver to move forward and when lowered caused the paver to move in reverse. The switch was labeled accordingly. (Supplemental Appendix, pp. 130-131).[3]

Evidence submitted through stipulated exhibits further confirmed the specialized nature of the paving industry and paving equipment. Such evidence identified various means of operating the paver in forward and

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[3] All references to the "Supplemental Appendix" are to the document filed by Respondent in the United States Court of Appeals for the Tenth Circuit.

backward directions through a separate switch, and a means of adjusting the speed of the paver through the speed control dial. Stipulated Exhibit 3 identified the anticipated purchasers of the subject paver, all of whom were in the paving industry. They included asphalt contractors, commercial contractors, and highway contractors. (Supplemental Appendix, pp. 81-84). Page 11 of the same exhibit (Supplemental Appendix, p. 91), referenced a separate forward/reverse selector switch and a propel speed dial. Stipulated Exhibit 4, an Operations and Maintenance Manual for the subject paver, referenced a backup alarm, which would sound when the direction of the travel switch was in the reverse position. (Supplemental Appendix, p. 105). The Manual noted that the alarm was used to alert people that the paver was backing up. The Manual further referenced a brake pedal, which disengaged the ground drive and power switch, and a separate switch which, when moved to the stop position, deactivated the machine ground drive. (Supplemental Appendix, pp. 113-114). The Manual specifically identified the speed selection control dial and provided an instruction to move the control counterclockwise towards the word slow to decrease the travel or pave speed and clockwise toward the word fast to increase the travel or pave speed. (Supplemental Appendix, p. 115). A separate instruction was given to operate the directional travel control to either the forward or reverse position. (Supplemental Appendix, p. 115).

Finally, stipulated Exhibit 8 (Supplemental Appendix, p. 134), an Asphalt Paver Principles & Techniques pamphlet, specifically stated on page 9 of the pamphlet, that "[m]ost modern asphalt pavers are equipped with

'speed control' dials which make it simple for the operator to maintain a set paving speed." (Supplemental Appendix, p. 136).

D. THE PETITIONER'S EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW

Petitioner failed to introduce evidence which would have allowed the jury to determine that the subject paver, even if defective, was dangerous to the extent beyond which would be contemplated by the ordinary consumer, as that term is utilized in Oklahoma law. The requirements to establish a right to recovery under a products liability theory in Oklahoma were initially set forth by the Supreme Court of Oklahoma in *Kirkland v. General Motors Corporation*, 1974 OK 52, 521 P.2d 1353, 1363:

> First of all Plaintiff must prove that the product was the cause of the injury; the mere possibility that it might have caused the injury is not enough.
>
> Secondly, Plaintiff must prove that the defect existed in the product, if the action is against the manufacturer, at the time the product left the manufacturer's possession and control. *Thompson v. Trane Co.*, Okl. 500 P.2d 1329 (1972). If the action is against the retailer or supplier of the article, then the Plaintiff must prove that the article was defective at the time of sale for public use or consumption or at the time it left the retailer's possession and control.
>
> Thirdly, Plaintiff must prove that the defect made the article unreasonably dangerous to him or to his property as the term "unreasonably dangerous" is above defined.

The definition of "unreasonably dangerous" adopted by the *Kirkland* court was taken from comment g to the Restatement of Torts 2d § 402A:

> The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

In *Woods v. Fruehauf Trailer Corporation*, 1988 OK 105, 765 P.2d 770, the Supreme Court of Oklahoma was required to determine the proper definition of "ordinary consumer." The Supreme Court of Oklahoma had previously recognized that it was only when a defect in the product rendered it less safe than expected by the ordinary consumer that the manufacturer would be held responsible. *Lamke v. Futorian Corporation*, 1985 OK 47, 709 P.2d 684, 686. In *Woods*, the Supreme Court of Oklahoma concluded that the proper definition of "ordinary consumer" in a products liability action is one who would be foreseeably expected to purchase the product involved. In the case at bar, the ordinary consumer would have been a person in the paving industry.

A brief review of additional portions of the *Woods* decision supports the conclusion that in this case both the trial court and Tenth Circuit were correct in their ultimate determination that the Petitioner failed to introduce sufficient evidence to justify submission to the jury. Although federal law dictates whether judgment as a matter of law is appropriate, in diversity cases the evidence is examined in terms of the underlying burden of proof as dictated by state law. *Magnum Foods, Inc. v. Continental Cas. Co.*, 36 F.3d 1491, 1503 (10th Cir. 1994). In *Woods*, through

expert testimony, the plaintiff submitted evidence to support his contention that the failure to equip the product at issue with devices which could have made it safer, or to warn of dangers of the failure to use such devices, rendered the product less safe than expected by one who would foreseeably be using the product for a foreseeable purpose. Just as in this case, that testimony was only potentially probative with respect to the existence of a defect, not to whether any such defect rendered the product unreasonably dangerous. The *Woods* product could be safely operated as equipped when placed into the flow of commerce and the safety equipment and warnings contemplated were simply an attempt to minimize an obvious danger. The Supreme Court of Oklahoma concluded that evidence that the product could have been made safer did not establish that it was less safe than would be expected by the ordinary consumer, which in that case and in this case was a specialized user, not the general public. The Supreme Court of Oklahoma concluded that plaintiff's failure to present such evidence resulted in a failure of proof of the necessary elements of the action and that a motion for directed verdict should have been sustained.

Likewise, in this case Petitioner failed in the necessary proof. As recognized by the Tenth Circuit, even if one assumed that Petitioner's evidence was sufficient to allow a jury to infer that the paver was defective, Petitioner did not establish that defect made the paver unreasonably dangerous to an extent beyond that which would be contemplated by the paving industry. In fact, the uncontroverted evidence in the case proved that the ordinary consumer was a person or entity involved in the paving industry, that the purchaser was well informed of

the proper method by which to control the movement and direction of the paver, that the use of a speed dial was common in the industry, that the paver had been previously used safely, that the accident was caused by user error and a failure to train, and that the paver was mechanically sound. Not a shred of evidence was presented to establish that the paver was unreasonably dangerous.

This evidence considered by the trial court, and considered in a *de novo* review by the Tenth Circuit, clearly and unquestionably demonstrates that both courts were correct in their determinations that the Petitioner had failed in her proof of the necessary elements of her claim under Oklahoma law. Judgment as a matter of law in favor of Respondent was the only appropriate option left for these courts.

INACCURACIES CONTAINED IN THE PETITION FOR WRIT OF CERTIORARI

In accordance with Rule 15 of the Rules of the Supreme Court of the United States, Respondent has an obligation to this Court to point out in this brief in opposition, and not later, any perceived misstatement made in the Petition. Respondent believes that numerous misstatements or misleading statements are, indeed, contained in Petitioner's filing.

1. Petitioner suggests that Respondent designed, manufactured, marketed and sold the subject asphalt paver with a defective, unreasonably dangerous "directional/speed dial control mechanism." Petitioner's description of the mechanism is inaccurate in that it

suggests that there was a single mechanism controlling both the direction and speed of the subject paver. In reality, the paver's forward/reverse direction of travel was controlled by a toggle switch, which if moved up into the position marked "forward" caused the paver to move forward and if moved down into the position marked "reverse" caused the paver to move backward. A totally separate rotary dial was used to control the speed of the paver. That dial had ascending numbers and a picture of a rabbit on the clockwise position indicating "fast" or an increase in speed. If the dial was turned counter-clockwise, descending numbers and a picture of a turtle indicated a decrease in speed. Thus, the direction of the subject paver and the speed of the subject paver were controlled independently of each other with two separate control devices.

2. Petitioner's suggestion that Respondent moved for judgment pursuant to Rule 50 of the Federal Rules of Civil Procedure after Petitioner's case was presented to the jury may be misleading. Following the close of the evidence presented by Petitioner, Respondent made its motions. The case had not, at that point, been submitted to the jury for its consideration. Petitioner made no request that she be allowed to reopen her case and present additional evidence. Respondent's motion was made prior to Respondent putting on witnesses or evidence beyond the testimony and evidence received in Petitioner's portion of the case.

3. Petitioner's assertion that the paver contained an "unconventional directional/speed dial control" is inaccurate. As stated, the speed control dial did not control the direction of travel of the subject paver. Moreover,

as has already been demonstrated, most modern asphalt pavers were equipped with speed control dials. Petitioner's suggestion that the "unconventional directional/ speed control dial mechanism" caused the paver to pin Petitioner against a tree and caused severe injuries to her, is inaccurate. The evidence in the case demonstrated that the cause of Petitioner's position and injuries was that the operator of the subject paver had the directional switch in forward instead of reverse and turned the speed dial to increase speed in the forward direction.

4. Petitioner's suggestion that the Court of Appeals for the Tenth Circuit found Mr. Munsell to be an expert in Mechanical Engineering is also inaccurate. The Court of Appeals made no specific finding concerning Mr. Munsell's expertise, but did conclude that part of his testimony was admissible expert testimony. Specifically, the portion of his testimony wherein he opined that the speed control dial failed to comply with SAE J297, a voluntary standard, was found to be the only admissible expert testimony provided by Mr. Munsell.

5. Petitioner's suggestion that evidence of SAE standard J297 was admitted without objection is contrary to the record. Counsel for Respondent very clearly objected to admission of the standard on the basis of relevancy, stating that it did not apply to the paver which is the subject of this case. (Tr. Trans. p. 81).

6. Petitioner's suggestion that the Court of Appeals has rendered a "mixed decision" that in and of itself calls for review is incorrect. The Tenth Circuit's decision was consistent with manufacturer's products liability law in the state of Oklahoma. The Tenth Circuit's finding that

Mr. Munsell could give expert testimony as to whether the rotary speed control dial complied with SAE J297 related, at best, to only one of the necessary elements the plaintiff must prove to prevail on a manufacturer's products liability claim; i.e., defect. Mr. Munsell was unqualified in the field of human factors and his research and preparation for trial were cursory and inadequate. This combination rendered his testimony unreliable and inadmissible. The trial court and the Tenth Circuit correctly concluded that such testimony could not help the jury. The Tenth Circuit specifically noted that, while a jury could infer that the product was defective based upon the failure to comply with SAE J297, there was insufficient evidence to show that any such defect made the product unreasonably dangerous to an extent beyond that which would be contemplated by the ordinary consumer. Petitioner failed to introduce evidence relating to that element of the claim and, therefore, the Tenth Circuit correctly concluded that judgment as a matter of law in favor of the Respondent was mandated.

7. Petitioner's repeated references to purported confusion on the part of Respondent's counsel in questioning Mr. Munsell are inaccurate, and simply reinforce the inescapable conclusion that Petitioner did not understand the necessity of introducing evidence relating to the expectation of the ordinary consumer, one in the paving industry. Review of the trial transcript reveals that Petitioner has mischaracterized and exaggerated the exchange upon which she relies. Respondent's counsel clearly understood how the speed control dial functioned but made a simple misstatement, accidentally saying "clockwise" when he meant "counter-clockwise". (Tr.

Trans. p. 92). In the wording of the question at issue, counsel specifically described a turn of the dial to the left toward the turtle picture and the word "slow", which was a counter-clockwise turn.[4]

In any event, Respondent's counsel was a lay person, not one who would be reasonably expected to purchase or use a paver. The expectation of a lay person was not relevant to a jury determination in this case. Thus, Petitioner's position that "Munsell is a mechanical engineering expert who opined that Respondent's paver's directional/speed *dial* control mechanism was 'counter-intuitive,' especially to lay persons" serves no purpose in the presentation to this Court, other than to once again confirm the inadequacy of the proof offered by Petitioner.

8. Petitioner's suggestion that Respondent somehow misled Petitioner to believe that Mr. Munsell was qualified is without merit. Respondent's counsel at no time was requested to or entered into a stipulation of sufficiency of qualifications or methodology. Respondent at all times denied Petitioner's allegations that the paver was defective and unreasonably dangerous. Moreover, Respondent's counsel never suggested that such a challenge would not be made. The critical question was not whether Respondent felt Mr. Munsell was qualified, but whether he, in fact, was qualified. It was incumbent on the Petitioner to have a qualified witness who utilized

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[4] "Q. If you turn it clockwise, or to the left, you have a turtle down here that says 'slow,' and then you turn it clockwise and the numbers get bigger and it comes around here to the rabbit." (Tr. Trans, p. 92, lines 16-19).

appropriate methodology. Respondent was not empowered to make an unqualified witness qualified or make insufficient methodology sufficient. The filing of a pretrial motion would not have affected either Mr. Munsell's qualifications or methodology. The trial judge was required to act as the gatekeeper, not the Respondent. Petitioner was unable to rehabilitate Mr. Munsell based upon a lack of qualifications and methodology, not due to any action or inaction of the Respondent or Respondent's counsel. This is true whether Respondent filed a motion *in limine* on August 1, 2000, included a specific challenge in the Final Pretrial Report filed on August 11, 2000, objected during Mr. Munsell's August 14, 2000 testimony, or moved to strike the testimony after its completion.

Petitioner, in effect, seeks to change the burden of proof. Instead of Petitioner being required to utilize a properly qualified witness who used appropriate methodology, petitioner wishes to shift the burden to the Respondent to demonstrate a non-qualified witness and insufficient methodology. Under Petitioner's suggested procedure, even a motion *in limine* filed by the deadline set by the trial court for the filing of pretrial motions, or a motion made during Mr. Munsell's testimony, would have been insufficient. Petitioner seeks both to improperly shift the burden of proof and improperly deprive the trial court and appellate court of their authority to preclude ultimate submission of inappropriate evidence to a jury.

CONCLUSION

Petitioner was not denied a trial by jury by any action of the Respondent, the trial court, or the Tenth Circuit. Rather, Petitioner was denied jury consideration because Petitioner tendered insufficient and unreliable evidence. This case presents no issue or question of the character justifying Petitioner's request that this Court grant her Petition for Writ of Certiorari. Petitioner has failed to demonstrate a compelling reason for involvement in or review by this Court. Respondent prays that the Petition be denied.

Respectfully submitted,

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(3)

Supreme Court, U.S.
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No. 01-969

In the Supreme Court of the United States

CHRISTI ALFRED, individually,
Petitioner,

v.

CATERPILLAR, INC., a/k/a and/or d/b/a CAT,
a/k/a and/or d/b/a CAT, a foreign corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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STATEMENT OF COMPLIANCE WITH SUPREME COURT RULES

Pursuant to Rule 15(6) of the Rules of the Supreme Court of the United States, Petitioner herewith replies to Respondent's Brief in Opposition to address several new points made by Respondent and to clarify certain inaccuracies lest the opportunity to make such clarifications be forever waived.

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REFUTATION OF RESPONDENT'S QUESTION PRESENTED

Petitioner advises the Court that Respondent has redefined and/or conflated Petitioner's "Questions Presented" into just one "Question Presented" and in so doing, has missed the essential point of Petitioner's appeal. Petitioner does not challenge the ability of the Court to act as a gatekeeper pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Company v. Carmichael*, 526 U.S. 137 (1999). Rather, Petitioner insists that the District Court failed to act as a gatekeeper **at the outset** of litigation pursuant to *Daubert* and *Kumho*.

Respondent does nothing but rehash the merits of the case and utterly fails to substantively explain why this Court should not grant certiorari. Respondent ignores the procedural improprieties in both the nation's courts in general and in the District Court's handling of this case in particular. With no valid objection being noted, Petitioner presents this Court an opportunity to remedy those improprieties, clarify the law, and establish a clear rule.

CLARIFICATION OF THE IMPORTANT ISSUES

A. Violations of the United States Constitution Occurred When Respondent Exploited a Circuit-Wide Split on the Propriety of Ambush Tactics.

The Federal Rules of Evidence (F.R.E.) and then-extant precedent notified Respondent, at the time this matter commenced, that it should object to Petitioner's expert in a timely manner. As more fully briefed in the Petition, the great weight of available authority and the overall goals of the

structure of the nation's legal system requires timely notice of Respondent's *Daubert* objection.

Respondent gambled that a last minute, stealthy, ambush-style objection might work to its favor and did not object until too late. It is undisputed that untimely *Daubert* objections are those made too late for the other party to react. Procedurally, fundamental fairness and the great weight of authority require, as more fully briefed in the Petition, that whatever prejudice results from delayed *Daubert* motions should be borne by the party failing to make a timely objection. The law and rules in effect at the time this matter commenced and was tried required that Respondent timely object if the expert's qualifications were questionable. Respondent sat stealthily and waited in ambush for the opportunity to challenge Petitioner's expert, which tactics received an approving nod from the District Court. Therein lies the violation of Petitioner's constitutional right to due process.

Notwithstanding Respondent's contrary assertions, the Federal Rules of Evidence in effect at the time Petitioner's complaint was filed and at the time of trial conclusively prove that Petitioner's position is not without merit or substance. The relevant portion of F.R.E. 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles

> and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Petitioner's expert in mechanical engineering, Mr. William Munsell, was a fully qualified mechanical engineering expert under any reading of F.R.E. 702. There was never any challenge to this. Moreover, there was no need for a human factors expert to be introduced because the substance of Munsell's testimony allegedly falling within the realm of human factors as a sub-specialty of mechanical engineering was not such "scientific, technical or other specialized knowledge" as to require a separate expert.

Indeed, a concept such as pushing a lever forward or backward is not so scientific, technical or specialized or outside the realm of the average juror's experience that an expert was needed at all. The court could have taken judicial notice of its axiomatic universality and simplicity. This is reinforced by the Notes of Advisory Committee on Rules to 1975 amendment to F.R.E. 702, which provide:

> There is no more certain test for determining when experts may be used than the *common sense inquiry* whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute. (Emphasis is added.)

It is undisputed that Respondent failed to move *in limine* to challenge Munsell's qualifications or raise the "expert in human factors" issue. It is likewise undisputed that the District Court failed to execute in a timely manner it's

duty and responsibility to act as gatekeeper contrary to precedent and F.R.E. 703. Respondent was required to *timely* move pursuant to F.R.E. 703 to challenge Munsell's testimony from ever being presented to the jury. F.R.E. 703 provides in relevant part:

> Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Indisputably, the jury heard the evidence without the District Court first finding that the probative value of Munsell's testimony could not assist "the jury [in] evaluat[ing] the expert's opinion" and before any finding that the probative value of Munsell's opinion "substantially outweigh[ed] [its] prejudicial effect." Having never objected, Respondent never sought to have the District Court make the required F.R.E. 703 finding. Extant authority and precedent, specifically *Daubert* and *Kumho*, established that an untimely objection to the expert's testimony forever waived the objection.

Also undisputed is the explicit language of *Daubert* and *Kumho,* which require that gatekeeping occur "at the outset" (*Daubert* at 592) of litigation. Gatekeeping did not occur "at the outset" in this case. The District Court allowed Petitioner's case to be sandbagged by Respondent, violating Petitioner's right to notice of the objection as required by the great weight of authority and this nation's concept of fundamental fairness: Due process of law.

There is in fact a circuit-wide split regarding waiver of so-called *Daubert* objections if they are not timely made. Respondent claims that Petitioner's cited cases are appellate cases. That is true, however, only because appeals resulted when the District Courts failed to act as gatekeepers in a timely manner and a delayed *Daubert* motion was one of the errors appealed. Respondent's argument that the circuits are not split aids them not in the least because when reviewing such appeals on a *plain error* basis, the circuit courts do not directly address the problem created when District Courts fail to require that objections be made "at the outset" (*Daubert* at 592). The circuit courts review the appeals for plain error, but each addresses the ambush differently. Some find the objection waived, but most find it questionable, as more fully briefed in the Petition. Finally, Respondent's reliance on *Goebel v. Denver and Rio Grande Western Railroad Co.*, 215 F.3d 143, (10th Cir. 2000) is misplaced. *Goebel* is inapposite because, unlike in this case, the Railroad properly and timely moved *in limine* for a *Daubert* hearing.

B. The District Courts Not Only Had the Responsibility and Authority to Act as Gatekeeper, But It Had the Duty and Obligation to Do so "at the outset" pursuant to *Daubert* and *Kumho*.

Respondent's assertion that "the law makes no requirement on the trial judge to make such a [gatekeeping] determination prior to the completion of the testimony" (Brief in Opp. at page 11) is simply not correct. The text, structure, theory and history of the various authorities of this nation's legal system require timely notice of any legal action which impinges upon a constitutional right. Not only does F.R.E. 104(a) require gatekeeping before (hence the use of the word "*preliminary*") presentation of the evidence to a jury, so too does F.R.E. 703, which requires the District Court to review

the expert testimony before "disclos[ure] to the jury." Respondent's reliance on F.R.E. 104(e) is misplaced as F.R.E. 104 defines *whose* duty it is to weigh the evidence and the credibility of admitted testimony. Petitioner should receive a new trial.

Respondent never challenges, and so concedes, Petitioner's contention she was entitled to due process and that notice is a fundamental element of due process. Substantively, Respondent's and Petitioner's respective arguments only differ with regard to the nature of the notice to which Petitioner was entitled. **Petitioner contends that she was entitled to timely notice of Respondent's *Daubert* objection and Respondent asserts that Petitioner had notice that she may be ambushed.**

Respondent refers to the Advisory Committee Notes to the 2000 Amendments to F.R.E. 702, (Brief in Opposition at page 11), which in turn references *Bourjaily v. United States*, 483 U.S. 171 (1987). In *Bourjaily,* this Court specifically declined in Footnote 1 to "address the circumstances in which the burden of coming forward to show that the proffered evidence is inadmissible is appropriately placed upon the nonoffering party." (*Id.* at 731, n.1). Both the Advisory Committee and Respondent have ignored that very important footnote. Considering the common sense simplicity of Munsell's testimony that, from a mechanical engineering perspective, ***pushing a lever forward to move forward and pulling a lever backward to move backward is intuitive,*** basic and common to the nature and experience of being human, **this matter presents the Court that golden opportunity.**

At trial, Respondent challenged Munsell's qualifications as a "human factors" expert. It was on this

basis alone that the Respondent challenged and the District Court struck Munsell's testimony (after it had been admitted without prior objection). Any attempt to now claim that Respondent also attacked Munsell's "methodology" is misleading. Interestingly, even the District Court commented that it did not really know what a "human factors" expert was and sustained Respondent's delayed *Daubert* objection. (*See* Petition for Writ of Certiorari, Appendix G, at 41a). Clearly this court in *Bourjaily* recognized that there could exist circumstances in which the burden of showing that the proffered testimony is inadmissible shifts to the non-offering party. (*Id.* at n.1). This Court now has the opportunity to address when the burden should shift to the nonoffering party. Without question, such a burden should be imposed upon the nonoffering party when, as here, it seeks to remove from consideration common sense testimony and evidence that has already been admitted and presented to the jury *sans* objection.

Moreover, when the subject of an expert's testimony is so basic to human nature and common sense, as was Munsell's, the law does not require parsing that expert testimony to an even finer sub-specialty within mechanical engineering so as to explain to the jurors what they already know. In a circumstance such as this, the burden of proving that the offered evidence was inadmissible was properly upon the nonoffering party to explain why pushing a lever forward to move forward and pulling a lever backward to move backward is ***not*** intuitive in human beings. (*Id.* at 731, n.1) Respondent should have been required to explain how and why **only** a particularly super-specialized expert from a sub-specialty within mechanical engineering is qualified to testify to the obvious. Only review by this Court can establish one clear rule as to ***when Daubert*** challenges must be made or be forever waived.

C. Respondent's Arguments Regarding Whether the Jury Could Have Found the Paver Unreasonably Dangerous and that Petitioner's Evidence was Insufficient Refers to the Underlying Merits of the Case and Is Not a Substantive Objection to This Court Granting Certiorari to Address When *Daubert* Challenges Should be Made or be Forever Waived.

Mr. Munsell's expertise in mechanical engineering was clearly more than sufficient to allow a jury to learn that the subject paver was designed with a two-step directional/speed dial control mechanism instead of the one-step directional/speed dial control mechanism recommended by applicable industry standard.

The evidence clearly demonstrated that when using the subject paver, the operator must 1) select a switch to move forward or backward and 2) turn a dial left or right to go fast or slow. Mr. Munsell's expertise in mechanical engineering qualified him to testify that applicable industry standards recommend a one-step directional/speed control mechanism where the paver operator merely ***pushes a lever forward a little to move forward slowly and pushes the lever farther forward to move forward faster.*** That same lever design would allow a paver operator to ***pull a lever backward a little to move backward slowly and farther backward to move backward faster.*** Such a design can also maintain a desired constant speed. In any event, Respondent's arguments in this regard go to the merits of the case as opposed to whether this Court should grant Certiorari on the issue of ***when Daubert*** challenges are to be made in order to satisfy the requisites of due process and fundamental fairness, or be forever waived.

Considering that Petitioner and the paver operator were trained and qualified members of the paving industry, they were both "ordinary consumer" as defined in Oklahoma by *Kirkland v. General Motors Corporation*, 1974 OK 52, 521 P.2d 1353. The jury could reasonably conclude or infer from the evidence before it, *sans* a human factors expert, that the subject paver was sold "defective to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Id.* at 1363.

CONCLUSION

Writ of Certiorari should be granted by this Court to establish a clear rule as to **when** a *Daubert* motion must be brought or be forever waived. The Court of Appeals opinion with respect to Respondent's Fed. R. Civ. P. 50 motion should be reversed and Petitioner should be granted a new trial.

Respectfully submitted,

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